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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 596. 209.

ALEJANDRO BARKER, VALERIANA BARKER, ANGELA BARKER, ET AL., PLAINTIFFS IN ERROR,

vs.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE ESTATE OF JOHN G. DOWNEY, DECEASED, AND THE MERCHANTS' EXCHANGE BANK OF SAN FRANCISCO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED FEBRUARY 21, 1894.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 536.

ALLEJANDRO BARKER, BALERIANA BARKER, ANGELA BARKER, ET AL., PLAINTIFFS IN ERROR,

vs.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE ESTATE OF JOHN G. DOWNEY, DECEASED, AND THE MERCHANTS' EXCHANGE BANK OF SAN FRANCISCO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error issued November 6, 1899	a	1
Caption	2	2
Transcript from superior court	3	3
Amended complaint	3	3
Answer	7	5
Findings of fact	20	12
Conclusions of law	29	18
Judgment	30	18
Statement on appeal	33	20
Plaintiffs' Exhibit 3. Patent to John J. Warner, January 16, 1880.	33	20
Defendants' Exhibit A. Expediente	39	23
Defendants' Exhibit B. Petition of John J. Warner	52	31
Defendants' Exhibit C. Deposition of John Foster	54	32
M. M. Sexton	55	33
Augustus Haraszthy	56	33
Field notes offered	59	35
Testimony of Philip Crosthwaite	60	36
Joseph Swycaffer	63	37
Adolfo Moro	65	38
Silvestra Moro	67	39
Machola Moro	68	40

	Original.	Print.
Transcript from superior court—Continued.		
Statement on appeal—Continued.		
Defendants' Exhibit G. Deposition of Jose Maria Avilla	72	42
Francisco I. De La C. Garcia	74	43
Pio Pico	75	44
J. J. Warner	76	44
Testimony of Leonardo Anlingawish et al	82	48
Alejandro Barker	84	49
E. L. Dorn	85	49
Leonardo Anlingawish (recalled)	90	52
Valentine Meechac	90	52
Jose Meechac	91	53
Deposition of Jose Castro	93	54
Opinion of board of land commissioners, Warner *v.* United States.	93	54
Decree of board of land commissioners, Warner *v.* United States.	95	55
Notice of appeal by United States, Warner *v.* United States	96	55
Decree of United States district court, Warner *v.* United States.	97	56
Notice of no appeal, Warner *v.* United States	98	57
Record in Pico *v.* Warner et al., offered	99	57
Testimony of C. W. Gates	100	58
Daniel Cunningham	103	60
Notice of intention to move for new trial	105	61
Assignment of errors	106	61
Specification in which evidence is insufficient	113	65
Agreement and certificate to statement	120	69
Notice of appeal	120	69
Stipulation as to correctness of transcript	121	69
Opinion	124	70
Dissenting opinion	127	80
Judgment	128	82
Assignment of errors	129	83
Petition for writ of error	137	86
Order allowing writ of error to operate as supersedeas	139	87
Citation issued November 6, 1899	140	88
Clerk's certificate	144	89
Writ of error issued January 17, 1900	145	89
Citation issued January 17, 1900	150	91
Clerk's certificate	153	92

a UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the honorable the judges of the supreme court of the State of California, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. Downey Harvey, administrator of the estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants Exchange Bank of San Francisco, a corporation, plaintiffs, and Allejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Romon Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, Jose Maria Chavez, Pasquel Peloat, Francisca Peloat, Jose Juan Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawilot, Anastasia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Savivil, Francisca Chutnicat, Silverio Nolasquez, Jose Antonia Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, Jose Cecilio, Salvador Gorra, Publicate Logrede, Jose Meechac, Concenciona Meechac, Valentin Meechac, Jose Maria Muta, Jose Antonio Soto, Marcelino Quashish, Josepha Quashish, and Juan Demati, defendants, wherein was drawn in question the construc-

b tion of a clause of the Constitution, or of a treaty, or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Allejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, Jose Maria Chavez, Pasquel Peloat, Francisca Peloat, Jose Juan Oulingawish, Cecelio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawilot, Anastasia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivel, Francisca Chutnicat, Silverio Nolasquez, Jose Antonia Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecelio Chiporosa, Francisco Loss, Jose Cecilio, Salvador Gorra, Publicate

Logrede, Jose Meechao, Concenciona Meechao, Valentin Meechao, Jose Maria Muta, Jose Antonio Soto, Marcelino Quashish, Josefa Quashish, and Juan Demati, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States for the Northern District of California.
By W. B. BEAIZLEY,
Deputy Clerk.

The foregoing writ of error is hereby allowed; and the same having been directed to be taken by the Department of Justice of the United States, and the defendants in error having waived in writing all bond and consented that writ of error may operate as a supersedeas,

It is hereby ordered that no bond be required for the prosecution of said writ and that the same operate as a supersedeas.

W. H. BENTLEY,
Chief Justice of the Supreme Court of the State of California.

1 (Indorsed:) L. A. 490. In the Supreme Court of the United States. Allejandro Barker et al., plaintiffs in error, v. J. Downey Harvey, administrator, et al., defendants in error. (Original.) Writ of error and supersedeas. Filed Nov. 18, 1899. Geo. W. Root, clerk. By A. W. Johnson, deputy.

2 In the supreme court of the State of California, from the superior court of San Diego county. Torrence, judge.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants Exchange Bank of San Francisco, a corporation, plaintiffs and respondents,
vs.
ALLEJANDRO BARKER ET AL., DEFENDANTS and appellants.
} L. A. No. 490.

Transcript on appeal.

WHITE & MONROE,
Attorneys for Plaintiff and Respondent.
SHIRLEY C. WARD &
FRANK D. LEWIS,
Attorneys for Defendants and Appellants.

Filed December 3rd, 1897.

T. H. WARD, *Clerk*,
By F. C. WOODBURY, *Deputy*.

3 In the superior court of the county of San Diego, State of California.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco, a corporation, plaintiffs,
vs.
ALLEJANDRO BARKER ET AL., DEFENDANTS.

Amended complaint.

Now come the plaintiffs, by leave of the court first had and obtained, and for cause of complaint against the defendants, allege:

I.

That the defendants above named are Indians and half-breed Indians, and that the defendants, Allejandro Barker, Vicente, José, Juan, Leon, Moro, Ambrosio, Chelo, Cenon, Salvario, Salvador, Ramon, Adolfo,
4 Capitan Matias, Leonardo, Pedro, Ramon, Chanate, Dolores, Francisco, José Celis, Calabaso, José Churo, Pedro Pablo, Jackateen, Joe, Salvador, sr., José, Juan Damati, Jesus, Adolfo, jr., Cenon, José la Luz, José Beney, Patricio, Macelino, Maria, Capitan José, Valenteen, Angel Maria, José Maria, Antonio Cueva, Little Antonio Cueva, José Cueva, José Maria, Trankelino, Capitan Dolores, Felix, José Juan, and Manual, are, respectively, known by the names in this paragraph hereinbefore stated; that the true names of all the other defendants herein are unknown to plaintiffs, and they are therefore designated by the fictitious names specified in the caption of the original complaint; and plaintiffs pray that when their true names are ascertained that the same may be inserted herein instead of said ficticious names.

II.

That the above-named plaintiff, The Merchants' Exchange Bank of San Francisco, is, and at all times mentioned in this complaint was, a corporation duly organized and acting under the laws of the State of California.

III.

That the above-named plaintiffs are the owners in fee simple of all that tract of land situate in the county of San Diego, State of California, and more particularly described as follows, to wit: The Rancho San José del Valle being lot 37, township nine (9) south, range 2 east; lot (37) thirty-seven, township ten (10) south, range two (2) east; lot thirty-eight (38), township ten south, range two east; lot thirty-seven (37), township ten

(10) south, range (3) east; lot thirty-seven (37), township ten (10) south, range four (4) east; lot thirty-seven (37), township eleven (11) south, range three (3) east; lot thirty-eight (38), township eleven (11) south, range four (4) east; all of San Bernardino Meridian, and being
5 the same land described in the patent of the United States to J. J. Warner, of date January 16, 1880.

IV.

That the above-named defendants are in the possession of portions of said tract of land, and that they and each of them claim an interest or estate therein, adverse to these plaintiffs; but these plaintiffs aver that the claims of said defendants, and each of them, are without any right whatever, and that the said defendants have not, nor has either of them any estate, right, title, or interest whatever in or to said land or premises, or any part thereof.

V.

That the plaintiff in this action assert and claim, and have ownership in fee simple, as aforesaid, to the lands and premises described in the complaint, under and by virtue of a patent issued to the predecessor in interest of these plaintiffs, on January 16th, 1880, by the United States of America, which said patent was so issued pursuant to the provisions of an act of the Congress of the United States, approved March 3d, A. D. 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and was founded upon a grant of the Government of Mexico. The plaintiffs' said claim and right to said land are protected and asserted under the laws of the United States and the stipulations and obligations of the treaty of Guadalupe Hidalgo, entered into by the Government of the United States and the Government of Mexico.

VI.

That on the first day of March, 1894, at the city of Los Angeles, county of Los Angeles, California, the said John G. Downey died intestate.

VII.

6 That on the 17th day of March, 1894, letters of administration upon the estate of the said John G. Downey were issued by the superior court of the county of Los Angeles, in this State, to the plaintiff, J. Downey Harvey.

VIII.

That said plaintiff thereupon duly qualified as such administrator and entered upon the discharge of the duties of his said office, and that said letters of administration have not been revoked.

Wherefore, plaintiffs pray:

First. That said defendants, and each of them, may be required to set forth the nature of their respective claims to said land, and that all adverse claims of said defendants thereto may be determined by a decree of this court.

Second. That by said decree it be declared and adjudged that the plaintiffs are the owners in fee of said lands and premises, and every part thereof, and that their title thereto is good and valid, and that the defendants have not, nor has either of them, any estate or interest therein, and that they and each of them be forever enjoined and debarred from asserting any claim whatever in or to said premises, or any part thereof, adverse to the plaintiffs.

Third. That plaintiffs may have a writ for the possession of said premises, as against the said defendants, and each of them, and for such other and further relief as to this honorable court may seem meet and agreeable to equity, and for costs.

WHITE & MONROE and
HUNSAKER & GOODRICH,
Attorneys for Plaintiffs.

(Endorsed:) Filed May 4, 1894.

7 [Title of court and cause.]

Answer.

Come now the defendants Alejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasques, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadalupe Nauwila, Maria Ignacio Nauwila, José Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, José Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Oulcot, Isidora Pena, José Maria Chavez, Pasquel Peloat, Francisca Peloat, José Juan Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpio Rodrigez, Francisco Nawilot, Anastacia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonia Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, José Cecilio, Salvador Gorra, Publicate Logrede, sued and served with summons herein either by their true names or by fictitious names, and for themselves and not for their codefendants and for answer to the complaint of plaintiff filed herein, deny and allege as follows:

I.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that the Merchants' Exchange Bank of San Francisco is and at all times mentioned in the complaint was a corporation duly organized and existing under the laws of the State of California, and for such reason they
8 deny that the said Merchants' Exchange Bank of San Francisco is now or was at any of the times mentioned in the complaint a corporation duly organized and existing under the laws of the State of California, or under the laws of any other State, or at all.

II.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that plaintiffs are the owners in fee simple of all of that tract of land described in Paragraph "III" of the complaint, and upon that ground they deny that plaintiffs, or either of them, are the owners in fee simple, or at all, of the lands and premises described in said Paragraph "III" of the complaint, or of any part thereof.

III.

They admit that these defendants are in the possession of portions of said tract of land described in Paragraph "III" of the complaint and admit that each of them claim an interest and estate therein adverse to these plaintiffs, but they deny that their claim, or that the claims of any of them, is without right, and deny that they, or any of them, have no estate, right, title, or interest whatever in or to said lands or premises, or any part thereof.

As a further and separate answer these defendants allege that they and their ancestors are now and were at the time of the acquisition by the United States from Mexico of the territory embraced within the State of California, and for many years prior thereto, Mission or Pueblo Indians, known and recognized as such under the laws of Spain, Mexico, and the United States; that at the time of the acquisition from the Mexican Government by the United States of the territory embraced within
9 the present State of California, and for more than thirty years prior thereto, these defendants and their ancestors were in the actual, peaceable, open, notorious, exclusive, and adverse possession, occupancy, and use of the following-described land, to wit:

Beginning at a point on the north boundary line of the Rancho San Jose del Valle in San Diego County, California, and north eighteen degrees, thirty minutes west, twenty-three and 9-100 chains from corner No. 23 of the official survey of said rancho; thence south sixty-five degrees west, one hundred and sixteen and 1-100 chains; thence north sixty degrees west, eighty chains; thence north thirty-one and ½ degrees west, fifty-two and 36-100 chains; thence north fifty-one degrees east, seventy-seven and 37-100 chains; thence north forty-six degrees east, forty-one and 66-100 chains; thence south fifty-seven degrees east, one hundred and twelve and 70-100 chains; thence south eighteen and ½ degrees east, fifty-four and 71-100 chains to the point of beginning, containing nineteen hundred and seven (1,907) acres.

That at all times hereinabove mentioned prior to the acquisition by the United States from Mexico of the territory embraced within the State of California, these defendants and their ancestors occupied and held such possession of said lands under and by virtue of the laws and regulations of the Mexican Government and under claim of right so to do; and were entitled by said laws and regulations to so use, occupy, and possess the same against all other parties whatsoever.

That the rights of these defendants and their ancestors to so occupy, use, and possess said lands were established and guaranteed by virtue of the laws and regulations of the Mexican Government in effect at all

times herein mentioned, prior to the acquisition by the United
10 States from Mexico of the territory now embraced within the State of California.

That these defendants, together with their ancestors, at all times since the acquisition by the United States from Mexico of the territory now embraced within the State of California, have been and remained in the continuous, open, notorious, actual, peaceable, exclusive, and adverse possession, occupancy, and use of all said lands as against all the world, and have acquired and now hold all the right, title, and interest so held and possessed by themselves and their ancestors, as aforesaid, prior to the acquisition by the United States from Mexico of such territory.

That in and by virtue of the treaty known as the "Treaty of Guadalupe Hidalgo," between the United States and the Mexican Republic and by virtue of the general law of nations, the United States recognized and stipulated to protect the rights and title of these defendants to the use, occupancy, and possession of said lands in the same manner as they and their ancestors had, under and by virtue of the Mexican laws and regulations, been entitled to possess and occupy the same.

That these defendants are now in equity the owners and against all the world are entitled to the possession, occupancy, and use of the said lands.

II.

That at the date of the grant or pretended grant by the Mexican Government, under which plaintiffs claim title to said lands and premises, they were occupied, possessed, and claimed by these defendants, their ancestors and predecessors, and that said lands were not vacant and unoccupied lands at such time, subject to private grant under the laws of Mexico.

That the said grant or pretended grant was made subject to and in subordination to the rights of these defendants, their ancestors
11 and predecessors, as aforesaid, to use, occupy, and possess said lands, and not otherwise.

III.

That by the confirmation of the grant under which plaintiffs claim and the issuing of the patent therefor the Government of the United States did not purport to give or to grant, and has not given or granted, any other or different title from that granted by the Mexican Government, to wit: a grant subject to and in subordination to the rights of these defendants, their ancestors and predecessors, to the lands and premises aforesaid, as hereinbefore stated, but that nevertheless said patent on its face purports to convey said lands and premises absolutely, and without regard to the rights and claims of the defendants, and without being subject or subordinate to their said rights or claims, as hereinbefore stated. The said patent is a cloud upon the title of these defendants, as aforesaid, to said land and premises.

Wherefore, these defendants pray that the plaintiff take nothing by this action, and that these defendants have judgment, that their right to the occupancy, use, and possession of said land and premises be decreed

to be prior and paramount to the said title of the plaintiffs; and that said patent be decreed to be subject and subordinate to their right to use, occupy, and possess said lands exclusively for their own use and benefit; and that they have such other and further relief as may be meet and proper, together with their costs in this behalf expended.

Now come the defendants, José Meechac, Concenciona Meechac, Valentin Meechac, José Maria Muta, José Antonia Soto, Marcelino Quashish, Josefa Quashish, sued and served with summons in this action under fictitious names, and for themselves and not for their codefend-
12 ants, and for answer to the complaint on file herein, deny and allege as follows:

I.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that the Merchants' Exchange Bank of San Francisco is and at all times mentioned in the complaint was a corporation duly organized and existing under the laws of the State of California, and for such reason they deny that the said Merchants' Exchange Bank of San Francisco is now or was at any of the times mentioned in the complaint a corporation duly organized and existing under the laws of the State of California, or under the laws of any other State, or at all.

II.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that plaintiffs are the owners in fee simple of all that tract of land described in paragraph "III" of the complaint, and upon that ground they deny that plaintiffs, or either of them, are the owners in fee simple, or at all, of the lands and premises described in said paragraph "III" of the complaint, or of any part thereof.

III.

They admit that these defendants are in the possession of portions of said tract of land described in paragraph "III" of the complaint, and admit that each of them claims an interest and estate therein adverse to these plaintiffs, but they deny that their claim, or that the claim of any of them, is without right, and deny that they, or any of them, have any estate, right, title, or interest whatever in or to said lands or premises, or any part thereof.

13 As a further and separate answer these defendants allege that they and their ancestors are now, and were at the time of the acquisition by the United States from Mexico of the territory embraced within the State of California and for many years prior thereto, Mission or Pueblo Indians, known and recognized as such under the laws of Spain, Mexico, and the United States. That at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the present State of California, and for more than thirty years prior thereto, these defendants and their ancestors were in

the actual, peaceable, open, notorious, exclusive, and adverse possession, occupancy, and use of the following-described land, to wit:

Beginning at granite rock 20x20x14 inches, marked "C—l," on the former site of an Indian hut on a high hill from which the northwest corner of the Indian cemetery bears south eleven degrees east, eleven and 56-100 chains—such Indian cemetery being the cemetery located in the old Indian village known as La Puerta de la Cruz—thence north eighty-eight and ½ degrees west, sixty-five and 60-100 chains; thence south forty-seven degrees east, sixty-two and 25-100 chains; thence south seventy-eight and ½ degrees east, twenty and 42-100 chains; thence north seventy-three and ½ degrees east, twenty-seven and 20-100 chains; thence north nineteen degrees west, twenty-six and 75-100 chains; thence N. 56° W. 20-75 chains, to the point of beginning; containing two hundred and sixty-six and forty-three one hundredths (266.43) acres.

That at all times hereinabove mentioned prior to the acquisition by the United States from Mexico of the territory embraced within the State of California, these defendants and their ancestors occupied and held such possession of said lands under and by virtue of the laws
14 and regulations of the Mexican Government and under claim of right so to do; and were entitled by said laws and regulations to so use, occupy, and possess the same against all other parties whatsover.

That the rights of these defendants and their ancestors to so occupy, use, and possess said lands were established and guaranteed by virtue of the laws and regulations of the Mexican Government in effect at all times herein mentioned, prior to the acquisition by the United States from Mexico of the territory now embraced within the State of California.

That these defendants, together with their ancestors, at all times since the acquisition by the United States from Mexico of the territory now embraced within the State of California, have been and remain in the continuous, open, notorious, actual, peaceable, exclusive, and adverse possession, occupancy, and use of all said lands as against all the world, and have acquired and now hold all the right, title, and interest so held and possessed by themselves and their ancestors, as aforesaid, prior to the acquisition by the United States from Mexico of such territory.

That in and by virtue of the treaty known as the "Treaty of Guadalupe Hidalgo," between the United States and the Mexican Republic and by virtue of the general law of nations, the United States recognized and stipulated to protect the rights and title of these defendants to the use, occupancy, and possession of said lands in the same manner as they and their ancestors had, under and by virtue of the Mexican laws and regulations, been entitled to possess and occupy the same.

That these defendants are now in equity the owners and against all the world are entitled to the possession, occupancy, and use of the said lands.

15 II.

That at the date of the grant or pretended grant by the Mexican Government, under which plaintiffs claim title to said lands and premises, they were occupied, possessed, and claimed by these defendants, their

ancestors and predecessors, and that said lands were not vacant and unoccupied lands at such time, subject to private grant under the laws of Mexico.

That the said grant or pretended grant was made subject to and in subordination to the rights of these defendants, their ancestors and predecessors, as aforesaid, to use, occupy, and possess said lands, and not otherwise.

III.

That by the confirmation of the grant under which plaintiffs claim, and the issuing of the patent therefor, the Government of the United States did not purport to give or to grant and has not given or granted any other or different title from that granted by the Mexican Government, to wit, a grant subject to and in subordination to the rights of these defendants, their ancestors and predecessors, to the lands and premises aforesaid, as hereinbefore stated, but that, nevertheless, said patent on its face purports to convey said lands and premises absolutely and without regard to the rights and claims of the defendants and without being subject or subordinate to their said rights or claims, as hereinbefore stated. The said patent is a cloud upon the title of these defendants, as aforesaid, to said land and premises.

Wherefore, these defendants pray that the plaintiff take nothing by this action and that these defendants have judgment that their right to the occupancy, use, and possession of said land and premises be decreed to be prior and paramount to the said title of the plaintiffs; and
16 that said patent be decreed to be subject and subordinate to their right to use, occupy, and possess said lands exclusively for their own use and benefit, and that they have such other and further relief as may be meet and proper, together with their costs in this behalf expended.

Now comes the defendant Juan Demati, and for himself and not for his codefendants, for answer to the complaint on file herein, denies and alleges as follows:

I.

That he has no knowledge, information, or belief upon the subject sufficient to enable him to answer the allegation of the complaint that the Merchants' Exchange Bank of San Francisco is and at all times mentioned in the complaint was a corporation duly organized and existing under the laws of the State of California, and for such reason he denies that the said Merchants' Exchange Bank of San Francisco is now or was at any of the times mentioned in the complaint a corporation duly organized and existing under the laws of the State of California, or under the laws of any other State, or at all.

II.

That he has no knowledge, information, or belief upon the subject sufficient to enable him to answer the allegation of the complaint that plaintiffs are the owners in fee simple of all of that tract of land described in Paragraph "III" of the complaint, and upon that ground he denies that plaintiffs, or either of them, are the owners in fee simple, or at all, of the lands and premises described in said Paragraph "III" of the complaint, or of any part thereof.

III.

He admits that these defendants are in the possession of portions of said tract of land described in Paragraph "III" of the complaint, and admits that each of them claims an interest and estate therein
17 adverse to these plaintiffs, but he denies that their claim, or that the claim of any of them, is without right, and denies that they, or any of them, have no estate, right, title, or interest whatever, in or to said lands or premises, or any part thereof.

As a further and separate answer, this defendant alleges that he and his ancestors are now and were at the time of the acquisition by the United States from Mexico of the territory embraced within the State of California, and for many years prior thereto, Mission or Pueblo Indians, known and recognized as such under the laws of Spain, Mexico, and the United States; that at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the present State of California, and for more than thirty years prior thereto, this defendant and his ancestors were in the actual, peaceable, open, notorious, exclusive, and adverse possession, occupancy, and use of the following described land, to wit:

Beginning at station No. 24 of the official survey of the Rancho San José del Valle, running thence north, fifty-seven degrees west, forty chains; thence south, thirty-three degrees west, thirty chains; thence south, fifty-seven degrees east, forty chains; thence north, thirty-three degrees east, thirty chains to place of beginning; containing one hundred and twenty (120) acres.

That at all times hereinabove mentioned prior to the acquisition by the United States from Mexico of the territory embraced within the State of California this defendant and his ancestors occupied and held such possessions of said lands under and by virtue of the laws and regulations of the Mexican Government and under claim of right so to do; and were entitled by said laws and regulations to so use, occupy, and possess the same against all other parties whatsoever.

18 That the rights of this defendant and his ancestors to so occupy, use, and possess said lands were established and guaranteed by virtue of the laws and regulations of the Mexican Government in effect at all times herein mentioned, prior to the acquisition by the United States from Mexico of the territory now embraced within the State of California.

That this defendant, together with his ancestors, at all times since the acquisition by the United States from Mexico of the territory now embraced within the State of California, has been and remains in the continuous, open, notorious, actual, peaceable, exclusive, and adverse possession, occupancy, and use of all said lands as against all the world and has acquired and now holds all the right, title, and interest so held and possessed by him and his ancestors, as aforesaid, prior to the acquisition by the United States from Mexico of such territory.

That in and by virtue of the treaty known as the "Treaty of Guadalupe Hidalgo," between the United States and the Mexican Republic and by virtue of the general law of nations, the United States recognized and stipulated to protect the rights and title of this defendant to the use, occupancy, and possession of said lands in the same manner as he and his

ancestors had, under and by virtue of the Mexican laws and regulations, been entitled to possess and occupy the same.

That this defendant is now in equity the owner and against all the world is entitled to the possession, occupancy, and use of the said lands.

II.

That at the date of the grant or pretended grant by the Mexican Government, under which plaintiffs claim title to said lands and premises, they were occupied, possessed, and claimed by this defendant, his
19 ancestors and predecessors, and that said lands were not vacant and unoccupied lands at such time, subject to private grant under the laws of Mexico.

That the said grant or pretended grant was made subject to and in subordination to the rights of this defendant, his ancestors and predecessors, as aforesaid, to use, occupy, and possess said lands, and not otherwise.

III.

That by the confirmation of the grant under which plaintiffs claim, and the issuing of the patent therefor, the Government of the United States did not purport to give or to grant, and has not given or granted, any other or different title from that granted by the Mexican Government, to wit, a grant subject to and in subordination to the rights of this defendant, his ancestors and predecessors, to the lands and premises aforesaid, as hereinbefore stated, but that nevertheless said patent on its face purports to convey said lands and premises absolutely and without regard to the rights and claims of the defendant and without being subject or subordinate to his said rights or claims, as hereinbefore stated. The said patent is a cloud upon the title of this defendant, as aforesaid, to said land and premises.

Wherefore this defendant prays that the plaintiffs take nothing by this action, and that this defendant have judgment that his right to the occupancy, use, and possession of said land and premises be decreed to be prior and paramount to the said title of the plaintiffs; and that said patent be decreed to be subject and subordinate to his right to use, occupy, and possess said lands exclusively for his own use and benefit; and that he have such other and further relief as may be meet and proper, together with his costs in this behalf expended.

Now come the defendants Horatio N. Rust, Indian agent; Rufina Cueva, Antonio Cueva, José Cueva, Dolores Cueva, Angel Quilpe, Maria
20 Quilpe, Santornin Chapo, Cenon Chapo, José La Luz, Patricio Quajo, Binea Chapo, Feliz Wickonla, Maria Antonia Wickonla, Dominga Paliwish, Madalena Palawish, Acovo Paliwish, Maria Los Angeles Paliwish, served with summons in this action either under their true names or under fictitious names, and disclaim any interest, right, or title in or to the premises in controversy, and ask that the said action may be, as to them, dismissed with their costs.

FRANK D. LEWIS,
SHIRLEY C. WARD,
Attorneys for Defendants.

Duly verified.
(Endorsed:) Filed Dec. 23d, 1892.

[Title of court and cause.]

Findings.

This cause having been called regularly for trial before the court on the 14th day of November, 1896, and a jury trial having then been expressly and duly waived by the respective parties, Messrs. White & Monroe appeared as attorneys for plaintiff, and Shirley C. Ward and Frank D. Lewis, esqs., appeared as attorneys for defendants. Alejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasques, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chanate, Francisco Nauwila, Guadalupe Nauwila, Maria Ignacio Nauwila, José Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, José Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomaso Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isidora Pena, José Maria Chavez, Pasqual Peloat, Francisca Peloat, José Juan
21 Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpio Rodrigez, Francisco Nawilot, Anastacia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonio Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, José Cecilio, Salvador Gorra, Publicate Logrede, José Meechac, Concenciona Meechac, Valentin Meechac, José Maria Muta, José Antonio Soto, Marcelino Quashish, Josefa Quashish, and Juan Demati. And the said Shirley C. Ward and Frank D. Lewis also appeared and disclaimed for the following-named defendants: Horatio N. Rust, Indian agent; Rufina Cueva, Antonio Cueva, José Cueva, Dolores Cueva, Angel Quilpe, Maria Quilpe, Santornin Chapo, Cenon Chapo, José La Luz, Patricio Quajo, Binea Chapo, Feliz Wickonla, Maria Antonia Wickonla, Dominga Palawish, Madalena Palawish, Acovo Paliwish, and Maria Los Angeles Paliwish. And the court having heard the proofs of the respective parties and considered the same and the records and papers in the case, and the arguments of the respective attorneys therein, and the cause having been submitted to the court for its decision and by the court taken under advisement, the court now finds the following facts:

I.

That all of the said defendants last above are Indians and half-breed Indians.

II.

That the plaintiffs are the owners in fee simple of all of that tract of land situated in the county of San Diego, State of California, and more particularly described as follows, to wit:

The Rancho San José del Valle, being lot 37, township nine
22 (9) south, range two (2) east; lot (37) thirty-seven, township ten (10) south, range two (2) east; lot thirty-eight (38), township ten

south, range two east; lot thirty-seven (37), township ten (10) south, range three (3) east; lot thirty-seven (37), township ten (10) south, range four (4) east; lot thirty-seven (37), township eleven (11) south, range three (3) east; lot thirty-eight (38), township eleven (11) south, range four (4) east; all of San Bernardino meridian, and being the same land described in the patent of the United States to J. J. Warner, of date of January 16, 1880, recorded in book 2, pages 73–94, of patents, in office of recorder of San Diego, California.

III.

That the defendants first above named are in possession of portions of said tracts of land, and they and each of them claim an interest or estate therein adverse to the plaintiff, but that the claims of the defendants and each of them are without right, title, or interest whatever in or to said land or premises, or any part thereof.

IV.

That the plaintiffs have ownership in fee simple to the lands and premises described herein under and by virtue of said patent issued to their predecessor in interest, J. J. Warner, on January 16, 1880, by the United States of America, which said patent was so issued pursuant to the provisions of an act of the Congress of the United States, approved March 3, 1851, entitled "An act to ascertain and settle the private-land claims in the State of California," and was founded upon a grant of the Mexican Government, and the plaintiff's said ownership is protected and asserted under the laws of the United States and the stipulations and obligations of the Treaty of Guadalupe Hildalgo entered into by the Government of the United States and the Government of Mexico, and
23 the plaintiffs have succeeded by mesne conveyances to the interest of the patentee in said patent.

V.

That on the 1st day of March, 1894, at the city of Los Angeles, State of California, said John G. Downey died, and on the 17th day of March, 1894, letters of administration upon the estate of John G. Downey were issued by the superior court of the county of Los Angeles, in this State, to the plaintiff, J. Downey Harvey, and that said plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of his said office, and so continued until the 26th day of July, 1895, when a will of said John G. Downey having been discovered, the said plaintiff was by said superior court of Los Angeles County, State of California, duly appointed administrator with the will annexed of the estate of John G. Downey, deceased, and that he thereupon duly qualified as such administrator with the will annexed, and entered upon the discharge of his said office, and that said letters of administration with the will annexed have not been revoked.

VI.

That said John G. Downey, in his lifetime and to the time of his death, and the said Merchants' Exchange Bank of San Francisco were the

owners in fee simple of all the lands herein described, and that during the lifetime of said John G. Downey he paid all the taxes of every kind that were levied or assessed upon any or all of said lands from the issuing of the patent until his death, and that since his death all taxes of every kind that have been levied or assessed upon said lands have been paid by the plaintiff herein; and that the defendants have not, nor has either of them, paid any taxes or any part thereof.

VII.

That the following-named defendants, to wit, Alejandro Barker,
24 Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasques, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cencioña Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chanate, Francisco Nauwila, Guadalupe Nauwila, Maria Ignacio Nauwila, José Blacktooth, Inez Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, José Blacktooth, Salvador Changalagash, Tomaso Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, José Maria Chavez, Pasqual Peloat, Francisca Peloat, José Juan Oulingawish, Cecilio Toshicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpio Rodrigez, Francisco Nawilot, Anastacia Nawilot, Maria Antonia Nawilot, Ambrosia Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonio Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuella Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, José Cecilio, Salvador Gorra, and Publicate Logrede were not, nor was either of them, nor were the ancestors or ancestor of either of them at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto, or at all, recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and the United States, and were not in the adverse possession, occupancy, or use of the following-described land, to wit:

Beginning at a point on the north boundary line of the Rancho San José del Valle in San Diego County, California, and north eighteen degrees thirty minutes west, twenty-three and 9-100 chains from corner No. 23 of the official survey of said rancho; thence south sixty-five
25 degrees west, one hundred and sixteen and 1-100 chains; thence north sixty degrees west, eighty chains; thence north thirty-one and ½ degrees west, fifty-two and 36-100 chains; thence north fifty-one degrees east, seventy-seven and 37-100 chains; thence north forty-six degrees east, forty-one and 66-100 chains; thence south fifty-seven degrees east, one hundred and twelve and 70-100 chains; thence south eighteen and ½ degrees east, fifty-four and 71-100 chains to the point of beginning; containing nineteen hundred and seven (1,907) acres, or of any portion of said land, which land is a portion of the land described in the complaint, and first herein described; and have never since that time been in the adverse possession, occupancy, or use of any or all of said land as against all the world, and have never acquired, and do not now hold, or have any right, title, or interest in said lands, or any part thereof; that they are not, nor is either of them, in equity or otherwise,

the owner or owners or entitled to the possession, occupancy, or use of said lands or any of them, but that the plaintiffs are entitled to the immediate possession of all of said lands.

VIII.

That the grant by the Mexican Government to the predecessors of the plaintiffs of the lands herein described was not made subject to or in subordination to the rights of said defendants, their ancestors or predecessors, or any of them, and no claim of any of said defendants, their ancestors or predecessors, to any of said lands was ever presented to the board of land commissioners of the State of California, as required by act of Congress.

IX.

That the following defendants, to wit, José Meechac, Concenciona Meechac, Valentin Meechac, José Maria Muta, José Antonio Soto, Marcelino Quashish, and Josafa Quashish were not, nor was
26 either of them, nor were the ancestors or ancestor of either of them, at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto, or at all, recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and the United States, and were not in the adverse possession, occupancy, or use of the following-described land, to wit:

Beginning at a granite rock 20x14 inches, marked "C—l," on the former site of an Indian hut on a high hill from which the northwest corner of the Indian cemetery bears south eleven degrees east, eleven and 56-100 chains—such Indian cemetery being the cemetery located in the old Indian village known as La Puerta de la Cruz—thence north eighty-eight and ½ degrees west, sixty-five and 60-100 chains; thence south forty-seven degrees east, sixty-two and 25-100 chains; thence south seventy-eight and ½ degrees east, twenty and 42-100 chains; thence north seventy-three and ½ degrees east, twenty-seven and 20-100 chains; thence north nineteen degrees west, twenty-six and 75-100 chains; thence N. 56° W., 20.75 chains to the point of beginning; containing two hundred and sixty-six and forty-three one-hundredths (266.43) acres, or any portion of said land, which said land is a portion of the land described in the complaint, and first herein described; and have never since that time been in the adverse possession, occupancy, or use of any or all of said land as against all the world, and have never acquired, and do not now hold or have any right, title, or interest in said lands or any part thereof; that they are not, nor is either of them, in equity or otherwise, the owner or owners or entitled to the pos-
27 session, occupancy, or use of said lands or any of them, but that the plaintiffs are entitled to the immediate possession of all of said lands.

X.

That the grant by the Mexican Government to the predecessors of the plaintiffs of the lands herein described was not made subject to or in

subordination to the rights of said defendants, their ancestors or ancestors, or any of them, and no claim of any of said defendants, their ancestors or predecessors, to any of said lands, was ever presented to the board of land commissioners of the State of California, as required by act of Congress.

XI.

That the defendant Juan Demati was not nor was the ancestors or ancestor of said Juan Demati at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto, or at all, recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, or the United States, and were not in the adverse possession, occupancy, or use of the following-described land, to wit:

Beginning at station No. 24 of the official survey of the Rancho San José del Valle, running thence north, fifty-seven degrees west, forty chains; thence south, thirty-three degrees west, thirty chains; thence south, fifty-seven degrees east, forty chains; thence north, thirty-three degrees east, thirty chains to place of beginning, containing one hundred and twenty (120) acres, or of any portion of said land, which said land is a portion of the land described in the complaint, and first herein described; and have never since that time been in the adverse possession, occupancy, or use of any or all of said land as against all the world, and have never acquired and do not now hold or have any right, title,
28 or interest in said lands, or any part thereof; that they are not, nor is either of them, in equity or otherwise, the owner or owners, or entitled to the possession or occupancy or use of said lands or any of them, but that the plaintiffs are entitled to the immediate possession of all of said lands.

XII.

That the grant by the Mexican Government to the predecessors of the plaintiffs of the lands herein described was not made subject to or in subordination to the rights of said defendants, their ancestors or predecessors, or any of them, and no claim of any of said defendants, their ancestors or predecessors, to any of said lands was ever presented to the board of land commissioners of the State of California, as required by act of Congress.

XIII.

That the Merchants' Exchange Bank of San Francisco is now and at all times mentioned in the complaint was a corporation duly organized and acting under the laws of the State of California.

XIV.

That none of the defendants or their ancestors at any time prior to the acquisition of the United States from Mexico of the territory embraced within the State of California occupied or held any possession of any

of the lands described in the complaint or herein described, under or by virtue of the laws or regulations of the Government of Mexico or under claim of right so to do, and were not entitled by said laws and regulations to so use, occupy, or possess the same, against all or any parties whatsoever, and that no right to occupy, use, or possess said lands or any of them by any of said defendants or their ancestors was established or guaranteed by the laws and regulations of the Mexican Government at any time.

That the United States did not by the treaty of Guadalupe
29 Hidalgo, or by the general law of nations, recognize or stipulate to protect any right or title of the defendants, or any of them, to the use, occupancy, or possession of any of said lands in any manner whatever.

Plaintiffs have title to all of said lands by virtue of the patent herein referred to, and at the date of the grant mentioned in said patent all of said lands were subject to private grant under the laws of Mexico.

By the issuing of said patent and the confirmation of the grant therein mentioned the Government of the United States purported and intended to convey said lands and premises absolutely without regard to the rights or claims of any of said defendants, and without being subject or subordinate to any rights or claims of any of said defendants to any of said lands, and none of said defendants have or ever had any valid claim or right to any of said lands.

Said patent is not a cloud upon any title of any of said defendants.

Conclusions of law.

As conclusions of law from the foregoing facts the court now hereby finds and decides:

I.

That the plaintiffs are the owners in fee simple and entitled to the possession of all the lots, tracts, and parcels of land as the same are described in the complaint on file herein, as against the defendants, all and severally, and all persons claiming or to claim the same, or any part of said lands under them, the said defendants, or either of them; and that neither one of said defendants has any right, title, or interest in or to said lands or any part thereof.

II.

That the plaintiffs are entitled to a decree as prayed for in their
30 complaint to quiet their title to said land against said defendants and each of them, and all persons claiming or to claim the same or any part thereof under or through the said defendants, or either of them.

III.

That the plaintiffs are entitled to judgment for costs to be taxed herein against such defendants as answered herein contesting plaintiffs' rights in

said premises; and as to the other defendants who have answered, disclaiming, costs are not to be taxed.

And judgment is hereby ordered to be entered accordingly.

San Diego, Cal., December 29, 1896.

W. L. PIERCE,
Superior Judge.

(Endorsed:) Filed Dec. 29, 1896.

[Title of court and cause.]

Judgment.

This cause having been regularly called and tried by the court, and the findings of fact and concl'sions of law having been duly rendered by the court, which are now on file in this cause, wherein judgment was awarded in favor of J. Downey Harvey, administrator, with the will annexed, of the estate of John G. Downey, deceased, and the Merchants' Exchange Bank of San Francisco, plaintiffs, against all of the defendants, and for costs against such defendants only as have answered contesting plaintiffs' rights in the premises, on motion of Messrs. White & Monroe, plaintiffs' attorneys.

It is now, therefore, ordered, adjudged, and decreed that the plaintiffs have judgment as prayed for in their complaint herein against the defendants Alejandro Barker, Baleriana Barker, Angela Barker, Vincente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasques, Adolfo Moro, Sylvestra Moro, Domingo
31 Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chanate, Francisco Nauwila, Guadalupe Nauwila, Maria Ignacio Nauwila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Oulcot, Isadora Pena, José Maria Chavez, Pasqual Peloat, Francisca Peloat, José Juan Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpio Rodrigez, Francisco Nawilot, Anastacia Nawilot, Maria Antonio Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonio Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, José Cecilio, Salvador Gorra, Publicate Logrede, José Meechac, Concenciona Meechac, Valentin Meechac, José Maria Muta, José Antonio Soto, Marcelino Quashish, Josefa Quashish, Juan Demati, Horatio N. Rust, Indian agent, Rufina Cueva, Antonio Cueva, José Cueva, Dolores Cueva, Angel Quilpe, Maria Quilpe, Santornin Chapo, Cenon Chapo, José La Luz, Patricio Quajo, Binca Chapo, Feliz Wickonla, Maria Antonio Wickonla, Dominga Paliwish, Madalena Paliwish, Acovo Paliwish and Maria Los Angeles Paliwish, and each and all of them; that all adverse claims of defendants, and each and all of them, and all persons claiming or to claim said premises or any part thereof through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless; and that the plaintiffs be, and they are, hereby declared and adjudged to be the true and lawful owners of the lands

described in the complaint and hereinafter described, and every
32 part and parcel thereof, and that their title thereto is adjudged to be quieted against all claims, demands, or pretensions of defendants, or either of them, who are hereby perpetually estopped from setting up any claim thereto, or any part thereof.

Said premises are bounded and described as follows:

That tract of land situated in the county of San Diego, State of California, and more particularly described as follows, to wit:

The Rancho San José del Valle, being lot 37, township nine (9) south, range two (2) east; lot (37) thirty-seven, township ten (10) south, range two (2) east; lot thirty-eight (38), township ten (10) south, range two (2) east; lot thirty-seven (37), township ten (10) south, range three (3) east; lot thirty-seven (37), township ten (10) south, range four (4) east; lot thirty-seven (37), township eleven (11) south, range three (3) east; lot thirty-eight (38), township eleven (11) south, range four (4) east; all of San Bernardino Meridian, and being the same land described in the patent of the United States to J. J. Warner, of date January 16, 1880.

And it is further ordered, adjudged, and decreed that the plaintiffs do have and recover costs, hereby taxed at one hundred and eighty-four and 75-100 dollars, against all of the defendants other than those who have disclaimed herein.

San Diego, Cal., December 29, 1896.

W. L. PIERCE, *Superior Judge.*

(Endorsed:) Filed Dec. 29th, 1896.

33 [Title of court and cause.]

Statement on appeal.

This cause was duly tried upon the seventeenth day of July, 1893, before honorable George Puterbaugh, judge of department two of the superior court, San Diego County, California, sitting without a jury, a jury having been specially waived, the plaintiffs being represented upon such trial by Messrs. Stephen M. White, T. B. O'Brien, Hunsaker and Goodrich, and the defendants by Shirley C. Ward and Frank D. Lewis.

Plaintiffs introduced certain evidence, which it is conceded established the fact that the Merchants' National Bank of San Francisco, one of the plaintiffs, was then and at all times in the complaint mentioned a duly organized and existing corporation under the laws of the State of California.

Plaintiffs then introduced in evidence a patent of the United States of America to John J. Warner, of date January 16th, 1880, which patent, marked "Plaintiff's Exhibit 3," with the omissions noted, was in the words and figures following, to wit:

The United States of America to all to whom these presents shall come, greeting:

Whereas it appears from a duly authenticated transcript filed in the General Land Office of the United States, that pursuant to the provisions of the act of Congress approved the third day of March, A. D. one thousand eight hundred and fifty-one, entitled "an act to ascertain and

settle the private land claims in the State of California," J. J. Warner, as claimant, filed his petition on the thirty-first day of May, A. D. one thousand eight hundred and fifty-two, with the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, in which petition
34 he claimed the confirmation of his title to a tract of land known as the "Valle de San José, and Agua Caliente," situate in the then county of San Diego, and State aforesaid, said claim being founded on two Mexican grants, the first made on the eighth day of June, A. D. one thousand eight hundred and forty, to José Antonio Pico, by Juan B. Alvarado, then constitutional governor of the department of the Californias, and the second made on the twenty-eighth day of November, A. D. one thousand eight hundred and forty-four to Juan José Warner, by Manual Micheltorena, then general of brigade of the Mexican army, adjutant-general of the same, governor-general commandant and inspector of the department of the Californias.

And whereas the board of land commissioners aforesaid, on the tenth day of October, A. D. one thousand eight hundred and fifty-four, rendered a decree of confirmation in favor of the claimant, the said J. J. Warner, which decree of decision having been taken by appeal to the district court of the United States for the southern district of California the said district court on the thirteenth day of February, A. D. one thousand eight hundred and fifty-six, in the cause entitled, "J. J. Warner, appellee, vs. The United States, appellants," rendered its decision, as follows, to wit:

This cause coming on to be heard on appeal from the final decision of the United States board of land commissioners to ascertain and settle the private land claims in the State of California, under an act of Congress approved March 3, 1851, on the transcript of the proceedings and decision of said board, and of the papers and evidence upon which said decision was founded. And it appearing to the court that the said transcript and the notice of appeal have been duly filed according to law, and counsel for the respective parties having been heard; it is
35 ordered, adjudged, and decreed that the said decision of said commissioners be affirmed; and it is further adjudged and decreed that the claim of the above-named appellee to the land as described in the grant is a good and valid claim, and it is ordered, adjudged, and decreed that the same be, and is hereby, confirmed. The land of which confirmation is hereby made is situate in the county of San Diego, and known as the valley of San José, and is bounded and described in the original grant and map to which it refers, copies of which grant and map are on file with the papers in this case as follows, to wit:

"On the east, by the entrance from San Felipe and the mountains; on the west, by the mountains and defile of Aguango; on the north, by the mountains, the southern limits being the canisal and the mountains, to the extent of six square leagues, provided said quantity of six square leagues be contained within the boundaries; but if there be a less quantity than six square leagues then the claim of appellee to such less quantity is hereby confirmed."

And therefore, on motion of P. Ord, attorney of the United States for the southern district of California, and on suggesting to the court that it

was not the intention of the United States to prosecute the appeal allowed in the aforesaid cause, the said district court, on the twenty-fourth day of February, anno Domini one thousand eight hundred and fifty-seven, ordered "that the order allowing an appeal in the said cause to the Supreme Court heretofore made be, and the same is hereby, vacated, and it is further ordered that the appellee have leave to proceed under the decree of this court heretofore rendered as a final decree." Whereby the proceedings of court upon title became final.

And whereas under the thirteenth section of said act of the third of March, anno Domini one thousand eight hundred and fifty-one,
36 and the supplemental legislation, and in accordance with the proceedings had pursuant to said act and supplemental legislation, there has been deposited in the General Land Office a return, with the descriptive notes and plat of the survey of the said claim, confirmed as aforesaid, authenticated by the signature of the surveyor-general for the State of California, which descriptive notes and plats of survey are in the words and figures as follows, to wit:

"U. S. SURVEYOR-GENERAL'S OFFICE,
"*San Francisco, Cal.*

"Under and by virtue of the provisions of the thirteenth section of the act of Congress of the third of March, 1851, entitled 'An act to ascertain and settle the private land claims in the State of California,' and of the twelfth section of an act of Congress approved on the thirty-first day of August, 1852, entitled 'An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the thirtieth of June, 1853, and for other purposes,' and whereas the United States district court for the southern district of California rendered a decision whereby it recognized and confirmed the title and claim of J. J. Warner to the tract of land designated as 'Rancho San José del Valle,' as appears from the certified copy of the final decree of said district court, a copy of which is hereto annexed, the said tract of land was surveyed in conformity to the grant thereof and the said decision, and I hereby certify that the accompanying map is a true and accurate plat of the said tract of land as appears by the field notes of the survey thereof, made by William Minto, deputy surveyor, under the direction of this office, which having been examined and approved, remains of record therein, and are in the words and figures following, to wit:

(Here follows in patent field notes of survey, which are omitted,
37 owing to their great length; the patent map is also omitted. It is admitted, however, that such description and map includes the northern half of the valley of San José, including the premises here in controversy, the southern half of the valley having been patented to Silvestre Portillo, under an earlier grant from the Mexican Government, dated in 1836.)

"In testimony whereof I have hereunto signed my name officially, and caused my seal of office to be affixed, in the city of San Francisco, this twenty-sixth day of February, A. D. one thousand eight hundred and seventy-nine.

[SEAL.] "THEO. WAGNER,
"*U. S. Surveyor-General for California.*"

Now know ye, that the United States of America, in consideration of the premises and pursuant to the provisions of the act of Congress aforesaid, of third of March, anno Domini one thousand eight hundred and fifty-one, and the legislation supplemental thereto, have given and granted, and by these presents do give and grant, unto the said J. J. Warner, his heirs and assigns, the tract of land embraced and described in the foregoing survey, but with the stipulation that in virtue of the fifteenth section of the said act neither the confirmation of this said claim nor this patent shall affect the interests of third persons.

To have and to hold the said tract, with the appurtenances, unto the said J. J. Warner, his heirs and assigns forever, with the stipulation aforesaid.

In testimony whereof I, Rutherford B. Hayes, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this sixteenth day of January, in the year of our Lord one thousand eight hundred
38 and eighty, and of the independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES.

By W. H. CROOK, *Secretary.*

[SEAL.]

S. W. CLARK,
Recorder of the General Land Office.

Recorded in vol. 11, pages 206 to 223, inclusive.

Recorded at the request of Wells, Fargo & Co., February twentieth (20th), A. D. 1880, at 10 o'clock a. m. D. A. Johnson county recorder.

After such patent was introduced in evidence it was stipulated by counsel that the plaintiff had succeeded by mesne conveyances to all the right, title, and interest of the patentee that passed by virtue of such patent, and it was further stipulated that plaintiffs had paid all taxes of every character that had ever been levied or assessed upon the premises in controversy since 1880.

Whereupon plaintiffs rested.

The defendants then offered in evidence duly certified copies of the complete original "expediente" in the Spanish language of the grant from Manuel Micheltoreno to J. J. Warner, dated November twenty-eighth, 1844, for the place known as "Valle de San José;" also a duly certified translation of such expediente in the English language; also duly certified copy of the complete original expediente of the grant made by Juan B. Alvarado to José Antonio Pico, dated June eighth, 1840, for the land known as "Agua Caliente" and translation thereof.

These expedientes and translations thereof were together marked as "Defendants' Exhibit A."

(For convenience of the court and counsel upon the trial of said cause it was stipulated that the printed copies of such expedientes contained
39 in the printed transcript on appeal in the old case of Gage vs. Downey, numbered in that court 14411, beginning at the top of page 67 of such printed transcript and continuing to the bottom of page 75 thereof, might be used in lieu of the exhibit offered by defendants.)

The following is a correct copy of the translation of such expedientes, as the same appear, both by defendants' "Exhibit A" and by the transcript on appeal, in the case of Gage vs. Downey.

YEAR 1844.

"Expediente" forwarded by the naturalized citizen, Juan J. Warner, in petition of the place known by the name "Valle San José."

MOST EXCELLENT SIR: Juan José Warner, resident of this department, and married to Anita Gale, father of family, before you and in accordance with law, appear and declare that since the year 1833 I have resided in the city of Los Angeles.

I am father of children born in this department, and being in want of a place on which to situate a very considerable number of stock, big and small, belonging to the children by marriage with my said wife, petition your excellency to have the goodness to grant to my said children in property the place known by name as "Valle San José," which is vacant, situated east of the pueblo of San Diego, and distant from said town about twenty leagues, surrounded by the mountain with entrance into San Felipe on the west of Temecula, on the north of Pala and west of Santa Ysabel, pledging myself to obtain an exact plan thereof for the use of the Government and of the assembly of the department.

And I hope there will be no objection in granting it and issuing the corresponding title thereto, provided that your excellency considers my children entitled to the favor which I petition for.

Wherefore, most respectfully, I pray you to be pleased to decree favorably, for which I will be most obliged, declaring that I proceed in good faith and everything else necessary.

JOHN JOSEPH WARNER.

Monterey, August 30, 1844.

GOVERNOR: The land which is petitioned for, it seems there is no objection to its being granted according to the information which I enclose from the Rev. P. F. Vincent Olivas, and from the judge of San Diego, Juan Marron. The petitioner is a naturalized citizen, and is a person of good qualities, so that if your excellency does not dispose otherwise you can accede to his petition.

MANUEL JIMENO.

Monterey, September 2, 1844.

(Same date.)

Extend to him the title, and I order that he be obliged to procure the plan thereof within four months from this date, and should he fail to comply with such obligation within said term, this title will be null and of no value.

So it is ordered and decreed.

MICHELTORENA.

In conformity with proceeding, decree, and proof thereof, I sign it on the same date and place.

JUAN JOSE WARNER.

The interested party, satisfied with the superior decree, will be obliged to present the plan within the appointed time, and meanwhile the same

interested party will be allowed to occupy the land, pledging himself to procure a document from the man in charge of San Luis Rey, stating the valuation of the property, which he will pay on the terms that the Government may dispose.

MANUEL JIMENO.

Monterey, September 6, 1844.

41 MONTEREY, *November 27, 1844.*

Seeing the petition in which this "expediente" begins the preceding information, I declare Juan J. Warner owner of the land he petitions for.

First justice of the peace of San Diego, with the object of applying for in property, the place by the name of "Valle San José," occupied formerly by Mission of San Diego, I pray you inform me about the following: If on this date it is abandoned, and the time it has been in such a state; whether it was abandoned on account of the many robberies on the part of the wild Indians; whether on this date the Mission of San Diego has any stock with which to occupy it. State the distance between the Mission, San Diego, and said place.

San Diego, 5, 1844.

Accept this common paper in the absence of the kind required.

JUAN JOSE WARNER.

OFFICE OF THE FIRST JUSTICE OF THE PEACE,
San Diego.

In view of the petition which the party interested remits to this office, I beg to state that the said "Valle San José" is, and has for the past two years been vacant and abandoned, without any goods nor cultivation on the part of San Diego; but said place belongs at the present time to the said mission, and at petitioner's request I sign this in San Diego.

August 6, 1844.

JUAN MA MARRON.

To the Most R. P. Vincent Olivas:

With the object of soliciting in property the place known by the name "Valle de San José," formerly occupied by the mission under your charge, I beg of you to be so *so* kind as to inform me if, at the present day, the Mission of San Diego does occupy the said land, and if not, how long since it has been abandoned.

JUAN J. WARNER.

San Diego, August 5, 1844.

42 The "Valley of San José" can be granted to the party who petitions for it, inasmuch as the Mission of San Diego, to whom it belonged, has no means sufficient to cultivate and occupy it, and it is not so necessary for the mission.

FR. VINCENT P. OLIVAS.

Mission of San Diego, August 5, 1844.

(Here appears a sketch or deseno describing the property petitioned for. The sketch includes the entire San José Valley, and includes the property in controversy.)

The citizen, Manuel Micheltorena, general of brigade of the Mexican army, adjutant-general of the same, governor-general, commander, and inspector of both Californias:

Whereas Juan José Warner, Mexican by naturalization, has petitioned for his own personal benefit, and that of his family, the land known by the name "Valle de San José," bounded on the east by the entrance into San Felipe and the mountain, on the west by the mountain and canyon of Aguanga; and on the north bounded by the mountain, and the boundaries on the south being the "Carrizo" and the mountain; having previously complied with the notices and investigations on such matters as prescribed by the laws and regulations, exercising the powers conferred on me in the name of the Mexican nation, I have resolved to grant him the said land, declaring it by these presents his property, subject to the approbation of the most excellent assembly of the department, and to the conditions following, to wit:

First. He will not be allowed to sell it, to alienate it, nor to mortgage it, to place it under bond, or to place it under any obligation, nor give it away.

Second. He will be allowed to fence it in, without interfer-
43 ence with the roads, and other usages, (servidumbres). He will hold it freely and exclusively, turning it to agriculture, or any other use he may please, and he shall build a house on it within one year, and live in it.

Third. He shall apply to the respective judge to give him judicial possession thereof, by virtue of this order, by which he shall mark out the boundaries whereon he shall place the stakes, some fruit and wild trees of some use or other.

Fourth. The land which is being granted consists of six leagues, more or less (seis sitios de ganado mayor) according to the respective map or plan. The judge who may give possession thereof shall have it surveyed according to law, leaving the residue (sobrante) to the nation for its use.

Fifth. Should he fail to comply with these conditions, he shall forfeit his right to the land, and it will be denounceable by another. Therefore I order that this present decree be to him his title, and holding it for good and valid notice thereof be entered into the respective books and be given to the interested party for his protection and other purposes.

Given in Monterey, on the twenty-eighth day of November, 1844.

Record of this concession is taken in the respective book, page 12, and following.

Most Excellent Governor:

Juan J. Warner, native of the United States of America, naturalized and resident of this department, before you appear and say: That in virtue of the title extended to me by the Government, granting me in property the "Valley San José" with the approbation of the most excellent assembly of the department, I herewith enclose the plan of the property, and authorized copy of the "expediente," that you may be pleased to pass it over to the most excellent assembly, for its approbation in case there
44 be no impediment, and I beg to remark that I can not forward the document from the person in charge of the San Luis Rey mission, in regard to the valuation of the property belonging to the said mission, and that if the Government does not dispose otherwise, you will please

appoint an expert on your part, and the interested party another, for its proper valuation.

I declare to proceed with what is necessary, etc. Praying your excellency to accept this common paper in the absence of what corresponds.

JUAN J. WARNER.

Los Angeles, May 12, 1845.

LOS ANGELES, *May 14, 1845.*

Report of this and other documents forwarded by the interested party being taken, all is transmitted to the commission on public lands.

PIO PICO, *President.*

AUGUSTIN OLVERA, *Secretary.*

SIR: The commission of public lands has examined with all possible care the "expediente" formed in consequence of the petition made by Juan J. Warner, on the thirtieth day of August of last year, about the place known by the name of "Valle de San José," which was granted to him, with title legally issued by the government of the department under date 28th November of said year, and it appearing from the said examination that the said concession in favor of Juan J. Warner was made in perfect conformity with what the laws prescribe on this particular, and that now it only remains for the interested party to comply with what the Government required of him, and to which he pledged himself, before obtaining the said title, to present a document from the person in charge of the San Luis Rey Mission, in which must be stated the valuation of the property situated on said place, whose value he shall pay according to the terms that the said government may determine. In view of this the commission submits to the deliberation of the honorable assembly the proposition that follows.

The concession is hereby approved in favor of Juan J. Warner, of the place named "Valle de San José," adjudicated in property by the government of this department, with title legally issued on the 28th day of November last, in conformity with what the law of the 18th of August, 1824, and the article 8 of the regulation of the 21st of November, 1828. The most excellent governor will please take the measures he may think proper, so that the valuation of the property situated on said place be made out, as well as the payment of its amount.

YGNACIO DEL VALLE.
NARCISO BOTELLO.

Hall of sessions, in the city of Los Angeles, May the 17th, 1845.

ANGELES, *May 21st, 1845.*

In session on this day, the honorable assembly has approved the proposition of the preceding report, ordering the present "expediente" to be returned to the most excellent governor for other purposes.

PIO PICO, *President.*
AUGUSTIN OLVERA, *Secretary.*

"Expediente" forwarded by José Antonio Pico, in the petition of the place named "Agua Caliente," 1840.

YEAR 1840.

Prefect of the Second District:

José Antonio Pico, lieutenant of the company named San Francisco, Mexican by birth, and serving at the present time in the army, by means of this petition in accordance with law, I appear and say, that having a hundred head of cattle in number I stand in need of a place on which to propagate the said quantity, which is all that now remains in my
46 possession, praying you to grant me the place "Agua Caliente" belonging to the Mission of San Luis Rey, since it is not needed by the said mission, having a house on it, and an orchard of little utility.

Wherefore, I pray you to be pleased to hurry up this my petition, as I request, for which consideration I shall ever be grateful.

Please accept this in common paper in the absence of the kind required.

JOSE ANTONIO PICO.

Pueblo de las Flores, January 7, 1840.

ANGELES, *January 21, 1840.*

Report of the justice of the peace in the port of San Diego, containing an application ordering that the interested party forward the corresponding plan of the place he mentions, and go soon to the administrator of the San Luis Rey mission, that he may also allege on his part what may be expedient.

TAPIA.
NARCISSO BOTELLO, *Secretary.*

SAN DIEGO, *April 7, 1840.*

In regard to the superior decree that precedes, dated 21st of January of this year, I state that the land "Agua Caliente" is the property of the San Luis Rey Mission, which has improvements, buildings and an orchard, from which derive their subsistence the Indians who live thereon, which is bounded by the property of Joaquin Ortega, and I believe it can be awarded to the interested party for being worthy, but without prejudice to the Indians, who from it derive their support.

This is all I have to say, etc.

JUAN MARIA OSUNA.

In view of the superior decree, I state that the place above mentioned, "Agua Caliente" belonging to this ex-mission, distant twenty
47 leagues, and which has on said place a place of worship, and agricultural lands, an orchard of small proportions, which is not of much utility to this ex-mission, it can be granted to the party interested, paying for the said place of worship and orchard, without molesting (prejudicar) the Indians, who live on said "Agua Caliente."

This is all I can say on the matter.

In the absence of the administrator,

ANDRES PICO.

San Luis Rey, April 8, 1840.

MONTEREY, *June 4, 1840.*

In view of the petition headed in this "Expediente," the report of the justice of the peace of San Diego, that the administrator of San Luis Rey, and that the prefect of the second district, together with everything else that was thought of, and in conformity with the laws

and regulations on the subject, I accord to the lieutenant, José Antonio Pico, the claim in the property of the place known by name of "Agua Caliente," comprised within San Luis Rey, bounded by the rancho of "San José Valley," by the boundary of the canyon of "Buena Vista," and by the mountain of "Palomar," pledging himself to pay for the place of worship and other improvements, which the Mission San Luis Rey may have on said place, and with the condition of not disturbing (prejudicar) the Indians that thereon may be established, and forward this order to the most excellent assembly for its approbation.

Juan B. Alvarado, constitutional governor of the department of both Californias; thus I order, decree, and sign.

ALVARADO.

(Here follows in expediente sketch and deseno, showing property granted, which includes the northern half of the San José Valley, and includes the property in controversy.)

48 *Political Prefect of the Second District:*

The citizen José Antonio Pico, lieutenant of the Stationiary Company of Cavalry Inaure, San Francisco, in accordance with law, appears and says: That having presented himself before that prefecture, under date of January 7th of this year, petitioning for the land named "Agua Caliente," in this petition was wanting the requisite on which it is based; and that, together with the Indians who live on the said place, I have taken these measures, for the Indians cede to me all the right to which they are entitled, simply because I go to settle alongside with them, to help them to take care of the few goods which they possess for their support. They praying through me for their emancipation, that so they may undertake with liberty their labors for the support and benefit of their families. In view of what has been said, I pray you to please accept this my petition, with my efforts and everything else that may be required.

I hope in your kindness that, well informed of this my representation, you will proceed as may be best, accepting this common paper in the absence of the kind required by law.

I declare to proceed in good faith, etc.

JOSE ANTONIO PICO.

Pueblo de Los Flores, April 9, 1840.

ANGELES, *April 11, 1840.*

Join to your preceding information, and together forward it to his excellency the governor of the department for his superior determination.

TAPIA.

NARCISCO BOTELLO, *Secretary.*

Most Excellent Governor:

The prefecture of this second district, with a full knowledge of the information and documents that precede, believes that the petition
49 of the party interested can be acceded to, if your excellency thinks proper, securing previously the due indemnity to the Mission San Luis Rey, and under the conditions expressed by the man in charge of said establishment.

TIBURCIO TAPIA.

NARCISO BOTELLO, *Secretary.*

Angeles, April 11, 1840.

Juan B. Alvarado, Constitutional Governor of the Department of both Californias:

Whereas José Antonio Pico has petitioned for his own personal benefit and that of his family the land known by the name of "Agua Caliente," bounded by the ranch of "San José Valley," with the boundary of the canyon of "Buena Vista," and by the mountains of "Palomar," having previously complied with the writs and investigations corresponding, as required by the laws and regulations, exercising the powers which are conferred on me in the name of the Mexican nation, I have resolved to grant to him the said place, subjecting himself to pay for the place of worship and other improvements that be there, belonging to the San Luis Rey Mission, and not molest (prejudicar) the Indians that thereon may be established, and to the approbation of the most excellent assembly of the department, and to the conditions following, to wit:

First. He is allowed to fence it in, without interfering with the roads, crossroads and other usages (servidumbres); he will possess it fully and exclusively, turning it to agricultural or any other use he may see fit, but within a year he shall construct a house thereon and live in it.

Second. When the property shall have been confirmed to him, he shall petition the respective judge to give him possession thereof, by virtue of this order, and shall mark out the boundaries on whose limits he shall fix the landmarks, some fruit and wild trees that may be of some utility.

Third. The land of which donation is hereby made is of the extent mentioned in the plan, which goes with the "expediente." The judge who should give possession thereof shall have it surveyed according to law, leaving the residue that may result to the nation for other purposes.

Fourth. If he should fail to comply with these conditions, he shall forfeit his title to the land, and it will be denounceable by another.

Therefore, I command that this present order be to him the title, and holding it for good and valid, a copy thereof be entered into the proper book, and given to the party interested for his protection and other purposes.

JUAN B. ALVARADO.
MANUEL JIMENO, *Secretary.*

Given at Monterey, on June 8th, 1840.

Record of this order is taken in the book of records on grant of public lands, page 2, Monterey date, etc., as above.

JIMENO.

Plaintiffs objected to the introduction of these expedientes and each of them and to the translations thereof, on the following grounds, as stated in the language of counsel:

"Mr. WHITE. These documents are objected to upon these grounds: In so far as the offer of the grant to Warner is concerned, it is objected to upon the ground that it is incompetent, immaterial, and irrelevant; that the patent is conclusive of the title in the patentee, and the successors in interest of the patentee; and that the antecedent proceedings and documents referred to have no bearing, and can in no manner affect the validity of the patent, or its adequacy as an instrument conveying title to the patentee.

51 In so far as the expediente with reference to the Pico grant is concerned, the same is objected to upon the ground that it is immaterial, incompetent and irrelevant, for the same specific reasons assigned with reference to the offer of the expediente in the case of Warner; and the additional objection is made in the case of Pico that the plaintiffs in this case claim under the patent to Warner that that patent is based, as shown upon its face, upon the grant made by Micheltoreno, Mexican governor of California, to J. J. Warner, and that the same cannot in any manner be affected, or influenced, or impaired, or controlled by any grant or assumed grant of the Mexican Government made to Pico; and, further, that in so far as it may appear that any grant was ever made to Pico, such grant never became effective; that it was never presented to the board of land commissioners of the State of California, as required by the act of Congress, never confirmed, and no patent ever issued thereon; that the board of land commissioners of the State of California confirmed the application of Warner and decreed that he was entitled to receive the patent thereon; that such proceedings were had as appears by the patent in the Warner case; that the United States district court confirmed the decree of the board of land commissioners; that, thereafter, an appeal having been taken to the United States Supreme Court by the Government of the United States from such order confirming the decree of the board of land commissioners, said appeal was dismissed, and the patent to Warner was issued, in virtue of the original decree of the board of land commissioners so confirmed by the United States district court.

I suggest that evidence may be submitted, subject to these objections, and the same considered when the case is finally submitted."

52 The COURT: "Objections noted. The court will reserve its ruling, and exception will be given the party against whom the ruling is made."

Upon the final decision of the cause, such objections to each of such expediente were sustained and exception granted to the defendants, which ruling defendants specify as error. (Error No. 1.)

Defendants then offered in evidence a duly certified copy of petition of J. J. Warner filed with the board of land commissioners "to settle private land claims in the State of California," asking confirmation of his title to the tracts of land known as "Agua Caliente" and "Valle de San José," filed and marked "Defendants' Exhibit B," which petition is in the language following:

"*Before the hon. commissioners on private land claims in the State of California.*

The petition of J. J. Warner respectfully represents that he claims by virtue of grants from the Mexican nation a tract of land in the country of San Diego in said State, known as the Valle de San José and Agua Caliente, as the same is described in the grants thereof and in the accompanying maps or disenos.

That so much of said land as is known as Agua Caliente was on the 8th day of June, 1840, granted to José Antonio Pico by Juan B. Alvarado, governor of California and authorized to grant lands in the name and on behalf of the Mexican nation; and the same has since become

vested in the present claimant. That the remainder of said tract was subsequently granted to this claimant by a decree of concession made on the 2nd day of September, 1844, by Manuel Micheltoreno, governor of California, and authorized to grant lands in the name and on behalf of the Mexican nation, and by a grant or patent therefor issued to said claimant by said Micheltoreno on the 28th day of November, 1844.

53 That the claimant went into possession of said land by virtue of said decree of concession, and of a decree or license accompanying the same authorizing him so to do, and that he has ever since continued in peaceable occupation and possession of the same, except when disturbed by the prevalence of war in the country or by the incursions of hostile Indians.

That said second-named grant was approved and confirmed to the claimant by an act of the departmental assembly of California, passed on the 17th day of June, 1845. The claimant has no knowledge whether said first-named grant has or not been so confirmed.

A copy of the said grant to José Antonio Pico and a copy of said grant to your petitioner are herewith filed and prayed to be taken as a part of this petition. The originals will be produced and proved as may be required. The other papers and documents relating thereto exist in the archives of the former governments of California in possession of the surveyor-general of the United States for the State of California.

The claimant relies on the above mentioned documentary evidence and will produce other proof should it be required by the board.

(Signed) J. J. WARNER.

(Endorsed:) No. 254. J. J. Warner, Valle de Sn. José, y Agua Caliente petition, filed in office May 31st, 1852. Geo. Fisher, Sec'y. Recorded in record of petitions, Vol. I, pages 121 and 122. Geo. Fisher, Sec'y."

To the introduction of this evidence plaintiffs objected upon the same grounds as stated to the introduction of defendants' Exhibit A; the objection was noted, but the evidence was received for the time being and ruling of the court was reserved upon the objection until the

54 decision of the cause, at which time the objection was sustained and an exception granted to defendants, which ruling defendants specify as error. (Error No. 2.)

(NOTE.—All the objections of the plaintiffs to this evidence and to all other evidence offered by defendants to which objection was made was stated at the time the evidence objected to was offered, but the ruling of the court was reserved until the final decision of the case, the evidence offered in the meantime being received, neither party objecting to such course. Such objections were, upon final decision of the case all sustained, and an exception in each case given to the defendants, each of which rulings defendants specify as error.)

The defendants then offered in evidence from the transcript of proceedings in case No. 254 in the old United States district court of southern California, in the case entitled J. J. Warner, claimant, vs. United States, for the place named Valle de San José and Agua Caliente, being the proceedings for confirmation of Warner's title to the lands in controversy before the board of land commissioners and the United States district

court, duly certified copies of the depositions taken at such time (June, 1853), of the following witnesses produced on behalf of the claimant J. J. Warner, being the depositions of John Foster, M. M. Sexton, and Augustus Harazthy, which depositions were marked "Defendants' Exhibit C."

The following is the substance of the depositions of such witnesses:

JOHN FOSTER testified as follows:

"My name is John Foster, age thirty-eight years, reside in San José, California; am acquainted with the ranch called 'Agua Caliente' in San Diego County, California. I know that José Antonio Pico had a
55 number of hands employed on that ranch making a vineyard to the extent of ten thousand vines. I passed over the ranch in 1833; the Indians were in possession at that time, and have been in possession ever since that time; the Indians have never been expelled from there that I know of. The next thing I knew Antonio Pico was in possession, as I understood, by a grant from the Government. The Indians I have referred to as occupying the ranch were Mission Indians; the same Indians were in the employment of Antonio Pico about 1840. I only know of the Indians being employed by Antonio Pico for the one purpose of setting out the vines. Pico's agent occupied the ranch until the lands were transferred, as I understand, to Juan Warner. While Warner lived on the ranch, I never visited it. I don't know the time when the possession changed from Pico to Warner. As a general thing, the grants were made with the condition that the Indians be permitted to remain there. The Mission Indians, to whom I have referred, were the only Indians established on the land."

M. M. SEXTON testified substantially as follows:

"My name is M. M. Sexton; my age, thirty-two years, and I reside in the county of San Diego. I know the ranch generally called 'Valle de San José,' or valley of San José, situated in the county of San Diego, about fifty-five miles in a northeasterly direction from San Diego; first knew it in February, 1850. It was then occupied by J. J. Warner; he had stock there. I was there afterwards, when he had about one hundred and eighty (180) head of cattle and from one hundred (100) to one hundred and fifty (150) horses; he had an adobe house and several outhouses and a corral on the place, and was living in the house with his family. He had some twenty-five acres under cultivation; there was a
56 vineyard on the place, formerly in dispute between Warner and the Indians, but now acknowledged by the Indians to belong to Warner.

"The vineyard was in that part of the rancho called 'Agua Caliente,' where there is a hot spring. There are ruins of large buildings at this place, formerly occupied by Indians for the mission of San Luis Rey, and erected by the mission, as I have been told and believe. These buildings were burnt about the month of December, 1851. The land is on the frontier, and I have never heard of any contesting claimant. It is called sometimes the 'Valle de San José' and sometimes 'Agua Caliente,' and by the Americans 'Warner's ranch.' Don't know the quantity of land. I lived about fifteen miles from Warner's. The Indians were troublesome to him; he was obliged to corral his stock at night, and they would

sometimes steal them from the corral. In the Indian outbreak in 1851, Warner had all his cattle taken away and never recovered but a small portion of them. His horses were at that time at another place and were not lost. At the present time he has horses on the place, in charge of the Indians, as I understand. There are two Indian rancherias, one at 'Agua Caliente,' where there are from one hundred (100) to one hundred and fifty (150) Indians; the other is on the southern portion of the rancho and is occupied by from fifty (50) to one hundred (100) Indians during the winter. There is still another rancheria on the rancho, near the mountain, containing some one hundred and forty (140) Indians during the winter. In the summer the Indians of these two latter places live in the mountains."

AUGUSTUS HARAZTHY testified substantially as follows:

"My name is Augustus Harazthy, and I reside in the county of San Francisco. I am acquainted with the Rancho Valle de San José y
57 Agua Caliente since December, 1849; at that time Mr. Warner was in possession. I knew him to be in possession for three years after December, 1849, and he is still in possession. During the period referred to I resided in the county where the said rancho is located, and was sheriff of that county; the ranch was assessed to him. He occupied the ranch by cultivating the same, and lived on it with his family till the Indians burned down his house in the revolution, which burning took place in November, 1851. The place was known by two names—one Valle de San José and the other Agua Caliente. On the San José there was a substantial, good adobe house, several corrals, and two large fields fenced, and some other outhouses of not much value. The improvements were new, about three years old from the time they were burnt, having been made in 1849 or 1850. In 1849, when I arrived there, there was only one shanty on the premises; it might have been built a year or so before; it looked new. The field at the house was made in 1850 or 1851. The field away from the house was made in 1849. I observed several fields; by whom I do not know; they were not fenced and not cultivated at that time. At Agua Caliente there was an old house which, from appearances, must have been very old. There was also a vineyard. During my whole stay in San Diego County he, the claimant, had one or more Indians in his employment. He employed Indians generally. The improvements to which I have referred are about three miles apart; that is, according to the Spanish saying, and I think they are five miles apart. Indians lived there, and applied to me, as sheriff, to keep Captain Warner from driving them off. The Indians continued to remain there, kept the grapes from the vineyard which Captain Warner claimed, and about November, 1851, the Indian
58 chief who resided at Agua Caliente came down, burnt the house, drove away the cattle which was on the San José. The Indians claimed Agua Caliente and the field which they cultivated. The cause of quarrel, as I understand it, between the Indians and Captain Warner, was that the Indians claimed the vineyard and Captain Warner claimed the vineyard. The dispute to which I have referred was with Antonio Gorra, who was afterwards shot, under sentence of court-mar*s*hal."

These depositions of Foster, Sexton, and Harazthy were objected to by plaintiffs on the following ground, as stated in the language of counsel, viz:

Mr. WHITE. "In addition to the objections already made, we add an objection to this offer that the depositions were not taken in the present cause; that that was a cause pending between parties other than those who are now before this court. And further, that the same appear to be mere extracts from the record of the trial, and appear to be declarations of witnesses as to the matters of fact which were determined at that time by the proper tribunal of the United States, and whose determination eventuated in the issuance of the patent referred to, and that the judgment of the tribunal established by law to pass upon the testimony of these various witnesses is conclusive upon this court, and that the patent itself is the final result of the deliberation and consideration of the matters referred to in these depositions, and the solution of which was within the jurisdiction of the land department issuing the patent and the court deciding that the patent should issue."

(Ruling upon this objection was reserved until the decision of the cause, neither party objecting to such course, and then sustained, exception being granted to defendants, such depositions being marked "Defendants' Exhibit C." This ruling defendants specify as error.) (Error No. 3.)

59 Defendants then offered in evidence for the purpose of showing further possession of the property in controversy by the Indians, field notes of the final survey of the exterior boundaries of the rancho of San José de Valle confirmed by the United States to J. J. Warner, such survey being made in July, 1859, by J. C. Hays, deputy United States surveyor and confirmed by the United States surveyor-general of California and by the district court, but subsequently set aside. It was not the survey as finally confirmed and upon which the patent was issued.

These field notes, after the conclusion of the description, contain the following statement:

"There are several Indian villages on this rancho were there are planted a large quantity of corn, pumpkins, grapes, and peaches."

Plaintiffs stated their objection to the introduction of such field notes, as follows:

Mr. WHITE. "Objected to upon the grounds assigned with reference to the first and second exhibits offered; and also upon the ground that it appears from the patent referred to that the survey in question was not adopted; and that the survey so made by the said John C. Hayes never reached a stage or condition when the same was effective or could be effective for the purpose of in any way affecting the title of any one to the lands in controversy; that the Hayes' survey so referred to in the exhibit offered is not to any extent connected with the claims made by the plaintiffs in this suit; and that such survey was rejected by the proper department of the Government of the United States, if in fact it was ever made, the patent showing that the description therein contained was based upon another survey, made at a later date." It was also objected that there was no foundation laid for it. It is necessary to show that the Hayes survey was approved in order to permit it to be introduced in evidence.

60 Counsel for defendants then stated that these field notes were not introduced to bind the plaintiff by its description, but merely for reference to the Indians' possession which they contain; whereupon Mr. White replied:

"If that is the object, it is objectionable because it is not the document admissible by law as record evidence of the facts, and it does not appear to be taken in the form of a deposition, or in any form which would bind the plaintiffs in this particular case.

Its admissions are simply the admissions of the individual who made a survey which was ineffectual, and never became a public record by reason of its failure to obtain final approval."

It was further objected to because it is mere hearsay evidence. The party is not a witness. Didn't make the declaration under oath; wasn't a party in interest, and his declarations could not bind either party to the suit. These field notes were introduced and filed and marked "Defendants' Exhibit B." The only portion thereof material to this controversy is the portion above quoted.

The ruling of the court upon such objection was reserved until the final decision of the case, neither party objecting to such course, and the objection was then sustained and an exception granted to defendants, which ruling defendants specify as error.

PHILIP CROSTHWAITE was sworn on behalf of defendants and testified as follows:

"My name is Philip Crosthwaite; am in my sixty-eighth year; live in Lower California; am acquainted with the location of Agua Caliente Indian village on Warner's ranch, in this county; have been there three times; was first there in 1850, when I was county treasurer and tax
61 collector of this county. The Indians at the Agua Caliente were assessed for their property, and I accompanied the assessor all over the property and went to the Agua Caliente. There were Indians residing there then; there were a number of Indian houses; I don't know how many; may be twenty-five or thirty, perhaps more; I can't remember, but there were quite a number of Indians living there."

The following question was asked the witness by counsel for defendants:

"Q. Were the Indians making any use of the lands of the Agua Caliente at that time?—A. Yes, sir."

Mr. WHITE. "Objected to on the grounds that it is immaterial, incompetent, and irrelevant; that the possession of the parties referred to by witness is immaterial in this case; that the patent of the United States Government controls any mere matter of possession, which might have been exercised in 1850 by the Indians, or any one else; that the patent can not be affected or controlled, varied or impaired by the oral declaration of the witness as to the possession of the parties who never made any attempt to perfect their possession, so that the same might ripen into title, and that the written evidence of the title, to wit, the patent, is controlling in this court as against the oral declaration of the Indians and this witness, and furthermore that if it is attempted to establish any ancient right, if any such thing there be, the condition of affairs in 1850 is immaterial."

The COURT. The question may be answered, ruling and exception reserved.

A. They were, sir.

At the time of the decision of the case, such objection was sustained by the court, and an exception granted to the defendants, which ruling defendants specify as error. (Error No. 4.)

62 Mr. WHITE. "I presume we might stipulate that the questions put to the witness, unless otherwise specified, are subject to the objections already made."

Mr. WARD. "I think we might stipulate that this is in, subject to your objection from now on to the close of the case; I think that general objection might be considered in all along."

Mr. WHITE. "Very well, if that is satisfactory to the court."

The COURT. "It is so considered; the ruling will be reserved and exception allowed to the party who may be ruled against."

(At the time of deciding the case, the court sustained such objection, and granted an exception to the defendants and ruled that all similar objections of plaintiffs which were considered as being interposed to all of the defendants' oral testimony were sustained and exceptions granted to the defendants, which rulings defendants specify as error. (Error No. 5, applying the courts ruling out all defendants' testimony.)

The witness, Philip Crosthwaite, after the stipulation that such objections should apply to all of his testimony, testified as follows, in response to the questions asked him:

"In 1850, besides the Indians living at Agua Caliente, there were one or two Mexicans and an American named Bill Marshall; he was afterwards hung there; he was living with a squaw named Isabel, and there were one or two Mexicans living there at the Indian village with them. I was there again in 1851, accompanied by Don Augustus Harazthy. The Indians used the waters of the Agua Caliente springs for irrigating; they had their irrigating ditches and used the waters from the hot springs to irrigate—the irrigating ditches conveying the water to their planting grounds.

63 Cross-examination:

Mr. WHITE. "In all these matters of cross-examination it will be understood that if my objections to the testimony in chief are sustained the cross-examination will be withdrawn. I ask leave to make it contingent upon that, under the circumstances; I believe that is the usual rule."

The COURT. It may be so understood.

(At the time of deciding the case, the court having sustained all of plaintiffs' objections to defendants' testimony, plaintiffs' entire cross-examination of this witness, and his cross-examination of all other of defendants' witnesses, was by the court permitted to be withdrawn.) (Specification of error.)

The witness then proceeded to testify as follows, in response to questions on cross-examination:

"I can't possibly say how much land the Indians were cultivating or irrigating or using when I was first there; it was so long ago. The Indians all had small gardens; I don't think it would be more than an

acre or two in the largest of them; I don't think there was a hundred acres altogether; there could not have been, because the Indians all had very small gardens; they had no market for what they raised; they only just raised for their own use; everybody knows that the Indians of those days had very small gardens."

JOSEPH SWYCAFFER, sworn on behalf of defendants, testified as follows:

Subject to all the objections already interposed to defendants' testimony, which objections were sustained by the court, at the time the case was decided, and exception granted to defendants, which ruling defendants specified as error.

Direct examination:

"My name is Joseph Swycaffer; I reside at Lakeside; age seventy-three years. I am acquainted with the Agua Caliente Indian vil-
64 lage on Warner's ranch in this county. First knew it in 1851; there were Indians residing there at that time. I could not say definitely, but would judge there were at that time there equally as many as there are now, unless they have very recently increased. I was there last with the Indian commissioners about a year and a half ago. I think there were about as many there in 1851 as there were a year and a half ago. The Indians were then making use of the lands around the springs, like all Indian rancherias; they all had their cultivations; they used the waters always. I have known the village off and on since 1851. I have lived most of the time since 1851 here in Old Town, San Diego, and part of the time on my ranch at Bellena. I began living there about 1858. My family moved away from there about four years ago. I lived there from 1858 until four years ago. I saw the Indians at Agua Caliente—at intervals employed a good many of them. I don't think there are any of the old ones living there now that used to be there in 1851; there may be of the young ones. I remember some of them; some of my old hands are there yet—the hands that used to work for me. When I was there in 1851 I saw holes in the rock that had been ground out, and had apparently been used for a good many years. I saw evidences of houses and evidences of cultivation; saw Indians and their ponies and lots of evidence of animal life; saw little irrigating ditches. It was the spring when I was there and they were preparing for cultivating their lots. I have seen the place since 1851 so often—I could not begin to tell the number of times I have had to go there. Perhaps I have seen it a good many times in a year; often had to go there to make arrests; other times I had to go there to get men to work;
Indian labor was the only labor we had in early days in this coun-
65 try. I once went there with my knapsack on my back. That was in the winter of 1851 and 1852—the time the raid was made on Colonel Warner.

Cross-examination:

I have been in Arizona—went there first about 1854—was back and forth very frequently; sometimes I stayed a week; sometimes longer; took the mail from here to Yuma—couldn't tell how often I went—every month or so from here to Yuma. I went to Arizona again in 1877; was

there about ten years then; was at Agua Caliente about eighteen months ago, and again about four years before that time; only stayed there a short time—perhaps an hour. I can't recollect when, prior to four years ago, I was there. I lived eighteen (18) miles from there and used to be there frequently; prior to that time I was over there with a man to see if he could not buy those springs from the Indians; his name was Gardiner, from the upper country; that was about five years ago. I was at the village in '77; I can't recollect how often I was there between '55 and '77, but I was there oftener than every five years, but I could not tell how often—whenever I wanted hands. When I went there as a soldier it was to fight the Agua Caliente Indians that had committed depredations—burned Warner's ranch and killed a lot of people. We got the Indians into a deep canyon, and had the Coahuilla Indian battle. We killed a few of them—shot a few; we shot four captains at the stake; I don't say that they were Agua Calientes; it was the Agua Calientes that were raising this fuss; we killed the Indians, and we certainly shot the right men; it's always the right ones."

ADOLFO MORO, sworn and examined, through the interpreter, interpreting from Spanish into English, testified as follows on behalf of the defendants:

66 "My name is Adolfo Moro; I live at the Agua Caliente Indian village, on Warner's ranch; don't remember the number of years I have lived there; I can not tell, because I am very old. I came there when I was very young. I don't know where I was born; I was raised by old man Carilla. I was not married at the time I came to Agua Caliente. After I came to the Agua Caliente I got married, and lived at the Agua Caliente now. My wife is a native of the Agua Caliente, and was born there; her father was there. I have six children now; I have two grown ones—one of them is captain of the Agua Caliente village; he is the one that commands us all now. There were more Indians at the Agua Caliente when I came than there are now. The Indians did not have as large crops then as now. They had some crops, and the balance they used for pasture and wood. The Indians made their living by sowing a little corn and pumpkins and whatever we had. They lived on some kind of wild seeds from the forests; there is a kind of seed called cholla and cuijota; another root they ate is called mescal and acorns and chillas; these things used to grow right around there where we lived. The Indians have used the waters of Augua Caliente ever since I have been there to irrigate their crops and also to bathe in. There have never been any white persons there having control of the springs except the Indians and my own father-in-law. He built two or three bath houses there so they could bathe in; now they have good houses there. They charge the white people for bathing there. Governor Downey has been there to take baths and paid me for them.

Alejandro Barker has bath houses there too. In early times the Indians, for meats, lived on jack rabbits and rats.

67 Cross-examination:

These bath houses were built there years ago by my deceased father-in-law. There are eight bath houses there now. I don't know

how many feet; I think just large enough for a Christian to walk in there standing. Don't know what tribe of Indians I came from. Mr. Carilla told me he brought me from Sacramento. I was very small when I came to Agua Caliente; after I came to the ranch and had a little knowledge, I could remember."

SILVESTRA MORO, a witness on behalf of the defendants, sworn and examined through the interpreter, testified as follows:

"I live at the Agua Caliente village, on Warner's ranch; I was born and raised there; am the wife of Adolfo Moro. There were a great many more Indians at Agua Caliente when I was a little child than now—many more old ones than young ones. When I was a little girl the Indians lived on seeds that used to grow there. We have some of them here now to show you, and also some of the mortars that we used to grind our seed with there at the Agua Caliente; we have several of them to show you. We did not bring the stones here—they are there at the Agua Caliente—on those flat rocks, where we used to go and pound the acorns and seeds. My mother has got some of the wild seeds that we used to live on. When I was a little girl the Indians used to cultivate, but not as much as they do now. These wild seeds that they used to live on grew right there at the Agua Caliente, where we are now living. When I was a little girl the Indians had stock and horses and cattle and sheep and goats; my father had a few goats and a few sheep and a few horses and some cows and some bath houses. They then used the waters of the Agua Caliente to do their washing and to bathe
68 in, and to soak their acorns, which are very bitter; they washed them to take the bitterness out, and besides to irrigate their crops that they had in cultivation. Do not know how old I am; I was raised there and got married there, and have been living there all my life."

MACHOLA MORO, a witness on behalf of the defendants, sworn and examined through the interpreter, testified as follows:

(All of the testimony of this witness, as well as that of the three preceding witnesses, was given subject to plaintiffs' objections heretofore stated, which objections were sustained at the time of the decision and exception given to the defendants, which ruling defendants specify as error.)

"I live at Agua Caliente, on Warner's ranch, right at the hot springs; I was born and raised right there. I am the mother of Silvestro Moro, the wife of Adolfo Moro. I remember when Juan Largo came to live on the ranch.

(It was stipulated that Juan Largo was Colonel J. J. Warner.)

"I was about half-grown woman then. There were as many Indians living at Agua Caliente village then as now—a little more then than now—more old people then than now. The Indians then used to live a good deal on acorns and lots of other stuff that grows around the hot springs there—grasses and cactus and one thing and another; lots of Indian names—acorns and chollas and islayas and some kind of wild cherries. Here are some of the different seeds we used to use. (Witness opens package and shows various kinds of seeds of wild grasses, fragments of cactus, and various other products of the soil and seeds that they lived upon there.) We got the seed and pounded it on the rocks and put some

hot water on it and took the bitterness out of it, and made a kind
69 of mush. My husband was José Maria Moro; he was the captain of the Agua Caliente village; had control over the people that lived there, and advised them to keep quiet and work—was captain a long time. The Indians had cultivation at Agua Caliente when I was a little girl, and my husband used to cultivate land. They didn't farm as much as they do now, because they had nothing to work with. They worked by a small stick with a little piece of iron on top of it and plowed with it by horseback from the horn of the saddle. Didn't farm much, but farmed a little wheat and beans and corn and one thing and another—pumpkins and watermelons. The Indians used the water of the Agua Caliente to irrigate their crops and used it for bathing, and used it to take the bitterness out of the acorns, and they used it all the time. In those early times there were some fruit tress at Agua Caliente. Antonio Gara had an orchard a little higher up, and another one a little higher up above the springs. My husband had an orchard above the springs; it was planted by his father. When my husband died he left his right to his son and from that on. He planted some few trees after the old man died—the father of my husband. I remember when the men were kind of broken up, the priests were coming along there and we had church sometimes and prayed there; whenever the priests got there we went to the church and prayed. The priest never lived there; he came from some place else. The church was a kind of corral—all around it there and big houses all around it, but there was a cross right in the middle, where the church house is now—right there standing up. It was not really a church house, but a big house where they kept the grain—a kind of grain house; they moved the grain and one thing and another, and then would have the church inside sometimes; they brought their chil-
70 dren and had church where the cross was. The big house for keeping grain in was built by some of the men who lived right there at the hot springs, under orders from the priests; the Indian men, women, and children all worked on it and built the house. I was never at San Luis Rey Mission while the priest had charge of it."

Cross-examination:

"I remember when Juan Largo left the ranch. I was not there when the Indians drove him away, but I heard a kind of talk about it. He was having some trouble at that time. My husband used to go and work in the upper country there and I was with him, and when we came back it was just about the time of the trouble. My husband didn't work for anybody; he was a kind of shoemaker. He used to hunt a good deal, and kill deer and make buckskin, and made these leathers; he died off there, while he was in the upper country; that is, at El Monte. I was never at Los Angeles, or San Gabriel Mission. The only time I was away was when we went to work there at El Monte. My daughter, Silvestra, was then born—a little bit of a girl; she was able to walk around a little, but I was still nursing her. The Indians at Agua Caliente cultivate a good deal more land now than when Juan Largo came there, because they are able to do it; they have the tools to work with, and they have got grain and horses and one thing and another to work with. They farm a little more now, but they have not been taking up any more land; they have been working right inside of where they have always been;

they have been using it for one thing and another—for pasture and one thing and another; their land is fenced; not long ago they got wire and got their fields fenced; before that they fenced it with brush; the wire fence is about the same place as the brush fence was; some places
71 the wire fence is inside of where the brush fence was, but it's about the same. We have now fenced in the lands we used to cultivate and use. Some of the land outside where the line runs now was left out. Wire fences were put up by the grandchildren there and the daughter; they fenced their own field. We put the fence up first. All the lands that the Indians used to use at the time Juan Largo came there are all fenced in; in some places they got some land that ain't fenced in, but they used it for pasture and one thing and another—to get wood, or cut poles, or something like that. Some of the lands we used to use for getting our food on, when Juan Largo came; there it is open in places where we have our farms; wheat and corn is all fenced, but outside where we have got our acorns and one thing and another, that is not fenced, but they are using it always the same. No white man has used or controlled our lands or the lands we have fenced at Agua Caliente, or controlled the waters of the springs since I can remember, but "Slim Jim" (Jim Walsh) was bothering us some; that was for a claim outside of the ranch. There are two or three kinds of acorns that we used to use growing right around the springs close, and some we had to go to the mountain to get."

The defendants here offered in evidence the depositions of José Maria Avilla, Ignacia Francisco de la Cruz Garcia, Pio Pico, and J. J. Warner, all witnesses on behalf of defendants, taken in pursuance of the stipulation attached to the depositions. These depositions were introduced subject to the plaintiffs' objections above referred to and were marked "Defendants' Exhibit G;" at the time of the decision of the case by the court, these objections were all sustained and defendants given an exception, which ruling defendants specify as error. (Specification of error.)

72 The following is the testimony of each of such witnesses, as appearing in such depositions:

Direct examination.

JOSÉ MARIA AVILLA: My name is José Maria Avilla; was born in March, 1820; am acquainted with the Rancho San José del Valle in San Diego County, in this State, and with the Agua Caliente Hot Springs thereon; first knew these springs in 1838.

(At this point in the taking of this deposition, it was stipulated that the parties may at the time of the trial interpose any objections being proper to the testimony of the witness, except as to the form of the interrogatory, and that such objection may be taken at the time of the trial with like force, as though taken at this time.)

Witness proceeds: "At that time there were Indians living at the Agua Caliente; these Indians were under the administration of the San Luis Rey Mission; families and small ones, there were more or less three hundred. There were Indian nuns there at the time. I saw these Indians again in 1846; they were living there permanently in houses; one very large adobe house; the balance were tulle houses; the houses were on one side of the Agua Caliente Creek. The house of the captain,

José Nocar, was right close to the vineyard on the other side; the vineyard was in the center of all, and the José Nocar house was close to the vineyard on the other side. The Indians lived on the wild things of the country; they killed deer and jack rabbit and other things, and they ate these oak nuts, and they had plenty of beans, and watermelons, and pumpkins, and chia; it is a seed that grows there; they take it and thrash it and eat it; it is a wild seed. The Indians had peaches and pear trees,
and right near the de la Porta Cruz—when you go out of the
73 valley, there is the Porta Cruz; that was not at the Agua Caliente; the Caliente lays there and the Porta Cruz lays there. (Indicating.) At the Agua Caliente the Indians had an orchard and a vineyard, and pear and fig and apple trees."

Cross-examination.

"Porta Cruz is very near the Agua Caliente; I can't say what was the distance—very close there; don't think it was as far as from here (Temple Block, Los Angeles) to East Los Angeles; it was that far, more or less—can't say exactly. The Americans took possession of this country in 1846; they first came in here then; the same year I was on Warner's ranch. The business that took me to Agua Caliente in 1846—I went there after some Indians that had killed some white people in San Diego. There was with us a good many people; of those living now, there is Dolores Sepulveda, Manuel Coronel, and Francisco Garcia; I don't remember anybody else. I have seen these gentlemen lately; have spoken to one of them in the last few weeks—to Francisco Garcia. I can name other events that have happened since 1846. I remember in 1847 when Antonio Avilla went to take charge of the ranch San Jacinto. In 1852–53, I was manager of Antonio Avilla's cattle. This is the year 1893. (Deposition taken July 10, 1893.) I stayed at Warner's ranch in 1846 about three days; was there again in 1867. In '67 I went there hunting horse thieves; they went through there with stolen property and stolen horses to Sonora. That was the main road to go to Sonora. I was living on my ranch here, when the Indians drove Colonel Warner off that ranch; I don't remember what year that was. Don Juan left there because he was afraid of the Indians and came here to Los Angeles. I don't remember within two or three years of what time that was. The
wild Indians were up from Chihuahua; they used to live right
74 down to the mouth of the Colorado River. I went to fight with those Indians in 1846. We went on beyond Warner's ranch on the other side of San Felipe to the Vallecitos; in two days we went up there and back. I was to Agua Caliente in 1838. Don Antonio Avilla and I were after horse thieves. We went clear up to the Vallecitos on that occasion. I have conversed with Francisco Garcia concerning my testimony here, and also with the attorney here (indicating Mr. Ward); talked with Garcia to-day—not before to-day. I don't recollect whether I was at Warner's ranch between 1846 and 1867—was not there after '67. The Indian nuns at Agua Caliente, when I was there, belonged to the San Luis Rey Mission. There were no priests there in 1838. The captain was in charge of them; José Nocar took charge of the Indians. I did not see the nuns there in 1846. I can't tell how far Agua Caliente is from where the San Luis Rey Mission was. I could go from one place

to the other, on a good horse, between sunrise and two o'clock. In 1867 I stayed at Agua Caliente two days. My home in 1838 was at Tejuata ranch, Los Angeles County. I have resided at that ranch all my life.

Re-direct examination.

"Stayed at Agua Caliente in 1838 two days and two nights. I knew the chief—José Nocar; my uncle and I were after the thieves, and the foreman, Nogales, gave an order to my uncle to ask for horses from José Nocar, and the Indians furnished us with horses so we could go right ahead after the thieves; we came back by Agua Caliente."

FRANCISCO IGNACIO DE LA CRUZ GARCIA, witness produced on behalf of defendants, testified as follows:

"My name is Francisco Ignacio de la Cruz Garcia; I am one hundred and twelve years old, and live in Los Angeles. I know the ranch San José del Valle in San Diego County, where the Hot
75 Springs are located. I knew that place in 1834. There were a good many Indians living there then, at Agua Caliente. After 1834, I used to go to Mexico two times a year, passing by the Agua Caliente; sometimes slept there. The Indians then lived in little tulle houses; they had some cattle; they lived on acorns and chia; they raised pumpkins, beans, and corn; there were over four hundred Indians there. They were Indians of the mission. There were little farms there; they had beans and vegetables and pumpkins and corn and so on, and lived in tulle houses. The mission furnished them with meat. After the missions, they had sheep belonging to the missions there. The sheep that the priests took charge of they took care of. These sheep belonged to the San Luis Rey Mission; the Indians took charge of them the whole way up to Pala. The captain killed sheep for us. I have not been to Agua Caliente for four years; I went through there in '86; I was there in 1868; I was there in 1846, when the war of San Pasqual took place, with a letter addressed to General Kearney; was not there between '46 and '68."

PIO PICO, a witness on behalf of defendants, was sworn, and testified as follows:

"My name is Pio Pico; I am ninety-three years old; live in the house of Mr. Warner in Los Angeles. I know the Agua Caliente Indian village and Warner's ranch in San Diego County; first knew it in 1820; there were Indians residing there then; such Indians were subject to the administration of the San Luis Rey Mission. I was administrator of that mission in 1835 up to 1840. I was not at Agua Caliente from 1820 to 1835; there were many Indians at Agua Caliente while I was administrator of the San Luis Rey Mission; maybe more than
76 one hundred. While I was administrator of the mission, I had a foreman at Agua Caliente village, who took oxen up there and put in their seeds on their farms, plowed for them, made a granary. The Indians lived there and worked under the charge of the foreman. I know nothing about the place after mission jurisdiction ceased; have never been there since 1840."

Cross-examination:

"I went there in 1820—took my mother and sister to the springs; my sister was sick and took her there for the benefit of the water to bathe in—the water to cure her. I am the Pio Pico who was the last Mexican governor of California."

J. J. WARNER, a witness on behalf of defendants, was sworn, and testified as follows:

"My name is J. J. Warner; my age eighty-five years; my residence is in Los Angeles County, California. I am the same J. J. Warner who received a grant of what is known as Warner's ranch in San Diego County, California, from the Mexican Government in 1844, but I thought the grant was in 1843. I first knew the Indian village of Agua Caliente, located on that ranch, in 1843; I saw the village frequently after 1843; there were Indians living there in 1843. These Indians were of the Coahuilla nationality, and they had been under the control of the Mission San Luis Rey. There must have been about ten families of Indians there at that time; their number increased both by aggregation and by births from that time until 1851, when I left the ranch as my place of residence. I was back there repeatedly until about 1860 and was over at the Agua Caliente village every time I went there. Between 1851 and 1853 there was some diminution of the Indians of the inhabitants at the village of Agua Caliente. The army officers of
the United States somewhat diminished the number by execu-
77 tion somewhere about 1851 and '52 and so did the civil and lynch
law cut off some of them. Their houses were burned and some moved away, but they generally returned after 1851. Those Indians made their living by going out on the ranches in San Diego and Los Angeles—principally in Los Angeles County—the males did and sometimes the females with them, and worked. When they returned they brought home some subsistence; they also gathered acorns and other things; they gathered grass seeds; they gathered some bulbous roots, and they planted some—a little corn and some beans, and had a few trees, from which they didn't get much good; they had a little fruit from them; they killed a good many rabbits, from which they got food; then they used to steal my sheep and sometimes my cattle; sometimes they bought a piece of beef from me. These Indians were never dispossessed from their places at Agua Caliente, that I ever heard of, from 1843 until the time I left there."

Cross-examination:

"When I spoke of the Indian population increasing by aggregation as well as by birth between 1843 and 1851, I meant the coming in of Indians belonging to that village, or that family of Indians, who had been dispersed in other parts of the country. I will explain: When the priestly authority over these Indians pretty much ceased at that time the able-bodied Indians at the Agua Caliente were nearly all at the San Luis Rey; the able-bodied males and females of the Agua Caliente were nearly all at San Luis Rey in 1831 from that time on, I don't know how much before that time; well, when the priestly authority pretty much ceased, the Indians dispersed in a great measure from the mission

and they went about the country seeking employment where they could find it—where they could get pay for their work, and some
78 returned to their villages. During the time that Father Parez managed the mission of San Luis Rey, a good many Indian villages of that mission were entirely withdrawn, and the village location became uninhabited."

(There was read to the witness various portions of papers constituting a part of the expediente of the grant to him from the Mexican Government, the provisions of which he recalled and recollected.)

Referring to his petition addressed to the Mexican authorities, asking for a grant to him of the Valle San José, the witness said:

"You see here is Agua Caliente and there is El Valle del San José. Now, El Valle del San José, so far as the mission of San Diego is concerned, had no connection with the Agua Caliente. When I wrote that petition, I was referring to the southern half of the San José valley; that is a geographical piece of land. I do not know where the lines of the Warner and Portilla grants are fixed. I remember a grant to José Antonio Pico. The land commissioners adjudged that my grant covered the Agua Caliente, the tract of land petitioned for by Pico."

Counsel for plaintiffs asked the following questions of the witness:

Q. The commission says among other things (referring to the opinion of the board of land commissioners concerning Warner's patent): "Two grants were presented and proved in this case; the first made by Juan B. Alvarado to José Antonio Pico on the 8th day of June, 1840; the other by Manuel Micheltoreno on the 28th of November, 1844, to the present claimant. The land embraced in the grant to Pico is designated by name Agua Caliente, and that described in the grant to Warner is called the Valle San José. On comparing the descriptions of the two parcels of land, and the map which constitutes a portion of the two expe-
79 dientes, it is manifest that the grant to Warner embraced the premises described in a previous grant to Pico."

Q. That is what I alluded to.—A. Yes, sir.

Q. You recollect that?—A. Yes, sir.

Q. That is true, is it?—A. That is true in regard to all that land being in the valley of San José.

Q. To continue, I am reading right along. The place known by the name of Agua Caliente constitutes the northern part of the valley by the name of San José, while the grant to Warner described the entire valley, and the witnesses testify that the grant made to Warner is known by these names, but more frequently it has recently been called Warner's rancho. The testimony shows that Pico had set out some vines on the place before the grant was made to him, and that he built a house on the place after the grant.

Q. Do you remember where those vines were?—A. Yes, sir; I remember seeing the vines, and was told by the Indians that Pico's man had planted there.

The witness then proceeds:

"All the vines were planted on a little plateau, the level land perhaps a little less than a quarter of a mile nearly west or southwest from the Agua Caliente Springs; southwest the hill upon which there had been an adobe building put up during the time of the mission. When I first

went to the ranch, there were two small vineyards within the Agua Caliente location, three or four hundred yards southwesterly from the Agua Caliente Springs and on the north side of the water that flowed from that spring southwesterly. I think there had been one or two thousand vines in each of the two vineyards. They were separated by a little narrow lane that ran between them. The southwesterly one was
claimed, occupied, and possessed by an Indian by the name of
80 Antonio Gara. The other one was claimed as common property
belonging to the mission—as community property belonging to the mission, in charge of José Nocar, an Indian. It was unfenced, and had been for a year or two unpruned. He told me that there was that vineyard that belonged to me; I must take care of it, and I had it fenced and pruned. Nocar was the chief. He was a man that had been in charge there, I think, by the mission. He had a little house on the south side of the stream—a little adobe house, with a little coral enclosing it. These vineyards were maintained as long as I knew anything about the ranch. I maintained the vineyard that I took possession of. I was driven off the ranch by the Indians in 1851 under the following circumstances: In the fall of 1851 I was warned by friendly Indians of the Valle de San José that some of the Indians of the Agua Caliente—Indians living in the mountains—Indians of the Coahuilla tribe, living in the mountains north and east of the Agua Caliente, were combining to make an attack upon me and my ranch. These warnings were repeated, and with such affirmation that, on a night some messengers were sent to me, I sent my family away from my residence in the valley of San José in the night, two days after which, or a day and a half after which, early one morning I was attacked by a large body of Indians of the Coahuilla nation, a number of whom were the Indians of the Agua Caliente. I fled away from my house after killing three Indians. I fled away and the Indians burned my house and drove my cattle off over the mountains. My family stayed away after that. I had some stock left on the ranch—some horses. I think I made the arrangement called for in the expediente in reference to the property. It was a mere nominal sum; I
don't remember; it was all arranged satisfactory to the mission."

81 Redirect examination:

In petitioning for my grant, I intended to include the whole valley, including Agua Caliente. I was alluding to the Valle de San José in my papers addressed to the parties in charge of the San Diego mission. About two-fifths of the valley, the southern part of it, had been occupied by the San Diego mission. The Agua Caliente village, however, is in the northern part of the valley, and was not included within the San Diego Mission jurisdiction. I can tell you historically about the Indian attack made upon me being incited by a white man. I have no personal knowledge of it, but can tell you historically. William Marshall, a white man, had so intrigued with those Indians at the Agua Caliente, that he led them, or a sufficient number of them, and controlled the whole village, so that on the night before they made the attack upon me, at my ranch, distance some three miles from the Agua Caliente, he had gone to the houses of the Indians, where white men were sleeping, and they had killed some five or six or seven white men, who were at that time at the village of Agua Caliente as invalids, or as assistants or

companions of invalids; so that it may be said that the whole village of men were led by Marshall, because they made no opposition, and it was only those Indians of Agua Caliente, so I was told, that went with Marshall and killed those invalids, and the Indians did the killing. They told me that Marshall stayed outside and told them to go in and do the killing; that he did not want to see their faces. He did not have any spite against them, but killed them so as not to have anything behind them in his attack on me. Some three and perhaps five of the Indians who made the attack upon me were sentenced by court-martial held at the cayote Indian village to be shot, and were shot by military com-
82 mand on the 28th of December, 1851. Subsequently Bill Marshall and a half-breed who was with him were hung by sentence of the county court at San Diego. Antonio Gara, who was the chief conspirator of the Indians at this outbreak, was executed, I believe, by command of General Bean. These Indians who were executed were all from the Agua Caliente village."

After such depositions were introduced in evidence, the following named parties, all old Indians, and defendants in this action, viz: Leonardo Aulingawish, Cecilio Chiporosa, Salvador Changalagash, Marcelino Sivimoat, and Anastacia Nawilot, were sworn on behalf of defendants, and testified through the interpreter, from Indian into English, as follows:

That they were born at the Agua Caliente Indian village on Warner's ranch; that they had lived there all their lives; that they were nearly grown when Colonel Warner first came on to the ranch; that they remembered when the American soldiers first came to the ranch; that there were as many or more Indians living at Agua Caliente village when they were children than there are now; that they have never been disturbed in their possession of the Agua Caliente; that the cultivation in early times, when Warner came on the ranch and before, by the Indians, was less than now; that the present cultivated fields include the old planting grounds, except in one or two places; that when Warner came on the ranch, and before, the Indians lived mostly on wild grass seeds, chilla and other seeds, acorns, wild cherries, tunas, mescal roots, rabbits, squirrels, and rats; that the Indians have always used the waters of the hot springs for irrigating, washing, bathing, and soaking acorns and other seeds, to take the bitter taste out of them.

And it was stipulated by counsel that the following named defendants, viz, Tomasa Nawilot, Sinin Sivimoat, Francisco Nawilot, José Black-
83 tooth, Isabel Aulingawish, Maria Ignacio Nawilot, Solidad Chatnicat and Manuella Sivimoat, are all old Indians and defendants in this case, and shall be considered to have testified on behalf of the defendants to the same effect as the Indians, Leonardo Aulingawish, Cecilio Chiporosa, Salvador Changalagash, Marcelina Sivimoat, and Anastacia Nawilot testified, as above stated.

In addition to the testimony of Leonardo Aulingawish and Cecilio Chiporosa, as above stated, they also testified that in early times, before Colonel Warner came to the ranch, the Indian village at Agua Caliente was under the charge of the priests of the San Luis Rey Mission; that the Indians worked the lands, but were told to do it by the priests, and that sometimes they took the crops that grew there down to the San Luis Rey Mission on pack animals; that they remember the lands used by the Indians and claimed by them at Agua Caliente before Colonel War-

ner came to the ranch; that they were the same lands the Indians are now using; that they showed the correct boundaries of such lands a year or two ago to Mr. Dorn, the surveyor; that the Indians have always used and claimed the lands they showed Dorn; that they cultivated that inside of their fences and used that outside of their fences and within the lines shown Dorn for pasture and for getting wood and gathering wild grass seeds for eating; that the Agua Caliente Indians drove Colonel Warner off the ranch because he was making some claim to the hot springs and the orchard.

Marselina Sivimoat, in addition to her testimony as above set forth, also testified that she remembered when the padres of the San Luis Rey Mission had charge of the Indians of Agua Caliente village; that she stayed at the San Luis Rey Mission when she was young, and
84 remained there until the mission broke up and the priests left; that the Indians farmed the land at the Agua Caliente, under orders from the padres, and took their grain down to the mission on pack mules.

All of the foregoing testimony, given by defendants, was introduced, subject to the plaintiffs' standing objections already interposed, as hereinbefore stated. The testimony was permitted to go in, and the ruling of the court upon such objections reserved, neither party objecting to such course, and at the time of deciding the case such objections were sustained, and exception granted to the defendants, each and all of which rulings defendants specify as error.

ALEJANDRO BARKER, one of the defendants, was introduced on behalf of the defendants and testified that he was one of the defendants; that he lived at Agua Caliente village, on Warners ranch, and was born and raised there; that he knew all the defendants in this action, and from his own knowledge, or from the local reputation in Agua Caliente village, he identified all the defendants who had not already testified, and who sat up any claim to the tract of land first described in defendants' answer, containing nineteen hundred and seven (1,907) acres (being the lands claimed by the Agua Caliente Indians) as being descendants either of the old Indians, who had already testified in the case on behalf of defendants, or of old Indians already dead, who had lived at Agua Caliente village; he further testified that all of the Indians of the Agua Caliente village had a few head of stock—may be altogether one hundred head of cattle—about forty head of horses and about forty or fifty head of sheep, and about the same number of goats; that their cattle and horses had been kept by the Indians outside of their fences and inside of the lines claimed by the Indians, that were shown
85 to Dorn; that the last few years the ranch men, under Governor Downey, had been taking up the Indian stock and corraling it whenever they found the stock outside the Indian fences and far down on the ranch, and making the Indians pay for it one dollar a head to have it released, and Governor Downey's stock has been pastured right up to the Indian fences, too, of late years.

This testimony of Barker's was given subject to the same objections already interposed by plaintiffs to defendants' other testimony, which objections at the time of the decision of the case were sustained and exception granted to the defendants, which ruling defendants specify as error.

E. L. DORN, sworn as witness on behalf of defendants, testified as follows:

"I am a surveyor. I have surveyed the Indian fields at Agua Caliente, and the lands around those fields that were shown me by the Indians as having been used and claimed by them in the early times. I made a map of that survey. (Map shown witness and he identifies it as being the map referred to.) I was engaged in making that survey in the summer of 1891, I think; was about two weeks at work on it; the map correctly shows the survey; I surveyed both the Indian fields in cultivation at that time, and the exterior boundaries of the entire tract claimed by them. That survey was made by me under the instruction of the United States board of Indian commissioners. I have both the field notes of the survey as to the lots and the exterior boundaries with me. (Map shown witness introduced by defendants in evidence, marked "Exhibit E." This map shows a tract of land, the exterior boundaries of which contain 1,907 acres, being the same tract of land first described in defendants' answer, and shows it to be located just inside the northern
86 boundary line of the Rancho San José del Valle, as patented, two of the boundary lines being also exterior boundary lines of the rancho, as patented. Inside of these exterior boundaries is shown a tract of land containing six hundred and thirty-three (633) acres, divided up into fifty small tracts, the dividing lines representing fence lines, and upon each tract the name of the Indian appears who was occupying the same. This 633 acres represents the fenced lands used by the Indians, defendants, under cultivation. This explanation of the map renders it unnecessary to insert the map here, or the field notes of the survey.)

The witness continues:

"I ascertained the separate lots located upon that map, which contain the different Indian names, by having the Indians go in a body to each piece of land with me, and show me the land, and give me the name of the person occupying it and using it. There is no one fence embracing all the fields; there are many separate fields fenced, but no general fence running around the entire cultivated fields, all adjoining each other. The yellow boundary line, intended to represent the exterior boundaries of the entire Indian claims, was made under the guidance of the Indians pointing out to me the lands they had claimed and been using. The Indians went with me and pointed out these lines that I ran; about twenty or thirty of them did; among them were the old Indians, Leonardo Aulingawish and Cecilio Chiporosa; they showed me what they claimed, where they wished to have their lines run, but I did not run them quite as they wished in this particular. In quite a number of cases the Indians wished me to go down on the ranch quite a good deal further and take in more land than I surveyed; they showed me where they had worked the land, the ruins of houses, and so on, and claimed that
87 they had lived there and the land belonged to them; consequently, I should take it into the survey. Outside of the Indians' fenced fields, I think about two-thirds of the land I have included in the exterior boundaries are rough, mountainous, and brushy. In some places these rough, brushy lands extend clear to the cultivated fields. The balance, I would say, would be considered good farming land, if cleared of the brush. In making my survey of these exterior boundaries I discovered

evidences of use and cultivation of lands outside of the lands included within the fenced lines, such as remains of an irrigating ditch and the ruins of houses. In one place there are remains of two or three houses. These are even outside of the exterior boundaries as surveyed by me. The reason I did not take in all the lands the Indians wished me to was that if I had gone far enough to get in these isolated pieces they showed me that had once been cultivated I would have had to have included a good deal of land that they had never used, or that showed no evidences of having been cultivated, so I thought it best to leave out some that they claimed to have been cultivated than to include some that they did not claim to have been using. The lands which I have included in exterior boundaries of my survey are in a measure by themselves, as it includes a valley that is cut off by a low range of hills that runs between it and the other larger portion of the valley, except that the timbered ravine runs through it. With that exception, it is all cut off by a low range of hills. I am familiar with the ranch lines as patented, and two of the exterior boundary lines of these Indian lands, as I have surveyed them, follow the ranch line. The time I made this survey the Indians' stock was ranging all over the lands that I had surveyed for them. The stock
88 were all outside of the Indians' fences, because their fences had their crops inside. During that season of the year their crops were growing, and they were pasturing their stock outside of their fences and within the ranch lines. Some of the stock pasturing on the lands I surveyed for the Indians may not have belonged to them. I was not acquainted with the stock and I don't know who owned all of it. I did not know that some of it did not belong to the Indians; I didn't notice the brand upon it. I didn't know that there was any other stock there than the Indians' stock. I think there was much as one hundred head. There might have been more, as much as two hundred and fifty (250) head, and I not notice them. I wasn't looking especially at the stock, but just saw it as I was working there. A few days after I made the survey of the Indians' lands at the Agua Caliente I made a survey of the lands claimed by the Indians at Puerta de la Cruz, on the San José del Valle rancho, and I made a map of that survey. (Map shown witness, which he identifies as being the map referred to.) The map is a correct delineation of the lines as surveyed by me."

(The map referred to is offered in evidence by defendants, marked "Defendants' Exhibit F," the exterior boundaries of which map conforms to the description of the lands described second in defendants' answer as being claimed by José Meechac and others, containing some 266 43-100 acres. The property it described is located in the northern part of the rancho San José del Valle and contains thirteen separate small tracts, all adjoining each other, with the name of the Indian occupant written upon each. These are intended to represent the cultivated and fenced fields of the Indians. The remainder, being about three-fourths of the entire tract shown within the exterior boundaries of the tract, is not in cultivation. Such map and field notes are not inserted
89 here, as the above statement regarding same is ample for the purposes of appeal herein.)

Witness then proceeds:

"I obtained my information upon which this survey was based in the same way as I did at Agua Caliente. I had the Indians go around with

me and show me the lines of their lands. The Indians living at Puerta de la Cruz and I ran the lines approximately in accordance with their instructions. The interior lines marked upon the map—that is, the small lots—they represent the fields the Indians were actually cultivating at that time. I cannot give exactly the area included within these small tracts, nearer than from the scale of the map. I might vary from the actual area as much as one-tenth or one-twentieth. The actual area included in the exterior boundaries, however, is 266 43-100 acres. The lands within their fences they were using for corn and beans, a few melons, and some grain. In making my survey, I saw evidences of ancient occupancy in the way of the remains of buildings and fences, mortars in the rocks, which showed they had been worn a great many years, and an old burial ground, in which I could see the graves and crosses scattered around, as is their custom. The lands outside of the fences of the Indians that showed evidences of having been cultivated in the past had evidently been deserted and not cultivated for some years—six or eight years, I should say. It was not enclosed, and there was no other evidence of use except the remains of an old irrigating ditch across it, which had been abandoned."

All of this testimony of the witness Dorn was given subject to the same objections interposed by plaintiff, as already noted, and such objections were all sustained by the court at the time of deciding the case, and exception given to the defendants, which ruling defendants specify as error.

90 LEONARDO AULINGAWISH, recalled as a witness for defendants, and testified as follows:

"I know the Puerta de la Cruz Indian village on Warner's ranch; have known it as long as I remember. There were Indians living there when Juan Largo came to the ranch. I think they had been living there many years before. Then there were a good many living there; now there is but four or five. Old Valentine Meechac was living there then."

It was stipulated that Cecilio Chiporosa would, if called to the stand, testify to the same things as the witness Leonardo Aulingawish testified to.

VALENTINE MEECHAC, a witness on behalf of defendants, was sworn, and testified as follows:

"My name is Valentine Meechac. I live at Puerta Cruz; have been living there as long as I can remember. My mother and father told me I was born there. I remember the old San Luis Rey Mission, when the priests had charge of it. I was at the San Luis Rey Mission then; I was to work there for the priests. I remember when Juan Largo came to Warner's ranch, and when the American soldiers came through. I was living at the Puerta Cruz when Juan Largo came to the ranch. My family are all dead. I had three children, boys and girls, but they are all dead—grown boys and grown women. There was planting done by the Indians at Puerta Cruz when Warner came to the ranch. They planted corn, beans, watermelons, and muskmelons, and we had orchards there. The Indians have been living at Puerta Cruz ever since. I remem-

ber the priests from the mission coming over to Puerta Cruz to have religious services once. I think the village was under the priests' charge at San Luis Rey Mission. There were a good many more Indians at
91 Puerta Cruz when Juan Largo came to the ranch than now; they have been dying off and very few left. The Indians then farmed more land than they do now, and on the other side of the creek. Now there are not so many, and they farm right where the orchard is now. We used to farm the other side of the creek—all that piece there, and we got the ditches and everything to show yet. When Juan Largo came to the ranch, the Indians used to live on acorns and wild cherries and chia and rabbits, and one thing and another, besides what they raised. They got these things right around close to where they live now. I had been at San Luis Rey Mission before Juan Largo came, but had come back and was at home when Largo came. I left San Luis Rey when they quit the missions. That made me come home where my father and mother were. I was a grown man when the priests abandoned the missions. I didn't see Juan Largo's house burn, but I heard talking about it. The Indians didn't leave their lands that are not cultivated now. They all died out, and that is the way the land stays now. Couldn't tell how many years ago since they cultivated their lands outside of their orchards. The owners died out, and the ground stayed the way it is now. It must have been a long while ago, though I could not tell how many years. There are lots of apple trees and peach trees and pear trees in the orchard, and in the vineyard grape vines. The Indians are now cultivating the same lands that they cultivated when Juan Largo came to the ranch, and have been doing so ever since."

JOSE MEECHAC, one of the defendants, and a witness on behalf of defendants, was sworn and testified as follows:

"I live at Puerta de la Cruz; have been living there ever since I can remember; was born there. Besides me, my wife, Concenciona,
92 lives there, Valentine Meechac, José Maria Muta, Marcelino Quashish, José Antonio Soto, and the son of José Antonio; there are some others married off from the place, but they stay away from there now, and there is Josefa Quashish, Marcelino's wife. Marcelino Quashish was born there. I have always lived at Puerta Cruz. When I first remember, the Indians cultivated the lands right where they now live, and also on the other side of the creek. I showed Mr. Dorn, the surveyor, the lands the Indians used to cultivate when I was a boy; the Indians used the lands out to the lines I showed Mr. Dorn, and some of the lands went outside of the lines he surveyed; he left it out—some of the lands; they used to use that land for pasture, and used it to get wood on, and to get acorns on, and to get chollas on. When I was a boy the Indians used and cultivated all the lands inside of their present fences and some outside. There were a good many more Indians there then than now, but the Indians now are working the same places that their fathers and mothers used to work. There are five grown men and one young boy there now. I used to work the lands outside of our fences, now abandoned, until I was a grown young man; don't know how many years since they stopped working it. The Indians still use a good deal of the lands outside of their fences for pasture and to get

wood on it, and some acorns and one thing and another. Once Governor Downey's men corralled our horses when they got outside of our fences; the owners of the horses had to pay to get them out. The Indians at Puerta Cruz have about twenty or twenty-one horses, one cow and three goats; long ago they had a good many more horses. We now keep our horses inside of the fences—since last year; they used to go all around there loose; we don't let them run out now, because Governor Downey's men won't allow it.
93 When they used to pasture outside of the fences, they used to run loose right around the rancherias there—sometimes on the upper place—sometimes below."

Whereupon defendants rested.

Counsel for plaintiffs thereupon said:

"If the court should hold that the depositions referred to by counsel, to wit, those of Sexton, Foster, and Harazthy, are admissible in evidence, in whole or in part, plaintiffs will offer in evidence, from the same transcript, the deposition of José Castro, which deposition is in substance as follows:

"My name is José Castro; age forty-four years; reside at Monterey, California; am acquainted with the Rancho Agua Caliente, and Valle San José, in the county of San Diego, California, called Warner's ranch. It was granted to him in 1844 by Micheltoreno; in July, 1846, this ranch was occupied by the claimant, Warner, who lived upon it and cultivated it extensively, and had cattle and horses upon it."

Plaintiffs then offered in evidence the opinion of the board of land commissioners, rendered by Commissioner Felch, from the transcript of the record in the case of J. J. Warner vs. United States, already referred to, being case numbered 254 of the old district court of the southern district of California, which opinion is in the language following:

"J. J. Warner vs. The United States, for the place called Agua Caliente y Valle de San José, in San Diego County, containing six square leagues of land.

Two grants are presented and proved in this case; the first made by Governor Juan B. Alvarado to José Antonio Pico, on the 8th day of June, 1840; the other by Governor Manuel Micheltoreno, on the 28th day of November, 1844, to the present claimant. The land embraced in
94 the grant to Pico is designated by the name of Agua Caliente, and that described in the grant to Warner is called the Valle de San José. On comparing the description of the two parcels of land and maps which constitute portions of the two expedientes, it is manifest that the grant to Warner embraces the premises described in the previous grant to Pico. The place known by the name of Agua Caliente constitutes the northern portion of the valley known by the name of San José, while the grant to Warner describes the entire valley, and the witnesses testify that the rancho claimed by Warner is known by these names, but more frequently it has recently been called Warner's rancho. The testimony shows that Pico had set out some vines on the place before the grant was made to him, and that he built a house on the place after the grant, but in 1842 he left the place, probably on account of the danger from the Indians, and does not appear to have done anything more in connection with it.

The proof is scarcely sufficient to establish the performance of the conditions of the grant by him, while his absence from the place, and the want of any evidence of an attempt to return to it after 1842, indicates an abandonment of it. It was so treated by Warner in petitioning for a grant of the same in 1844, and by the governor in making the concession to him. If, however, there was any remaining interest in said Pico by virtue of the grant to him, the present claimant has succeeded to that interest by virtue of a conveyance made to him by said Pico on the thirteenth day of January, 1852. This conveyance is given in evidence.

I think, however, that the right of the present claimant must be determined entirely by the merits of the case based on Michelteroena's grant to him.

This grant was approved by the departmental assembly May 21, 1845.

95 The testimony of Andres Pico shows that Warner was living with his family on the place in the fall of 1844 and cultivating portions of the land.

His residence on the place appears to have been continued until 1851, when the Indians burnt his buildings and destroyed his stock. Since that time his occupation has been continued by his servants.

In the grant, the description of the land petitioned for is such as to embrace the entire valley called San José, as laid down on the map constituting a part of the expediente, giving well-defined land marks and boundaries, which the witnesses testify are well-known objects.

The valley is very irregular in shape and is surrounded by high hills.

Juridical measurement was required and the quantity of six square leagues was granted, but as the measurement was never obtained, it is important to determine whether the grantee is entitled to hold the entire premises described in the grant; using the scale given on the desino referred to in the grant, the quantity included in the premises can not exceed six square leagues of land.

The testimony of the witnesses who were interrogated on the subject estimate it variously; some more and some less than the quantity conceded. On an examination of the whole case, however, we are inclined to the opinion that the petitioner should have a conformation of the premises according to the description contained in the grant to him, and a decree will be entered accordingly.

Confirmed.

Filed in office Oct. 10, 1854.

GEO. FISHER, *Sec'y.*"

Plaintiffs next offered in evidence the decree of the board of land commissioners in the same case, which is in the language following:

J. J. Warner vs. *the United States. Decree.*

96 "In this case, on hearing the proofs and the allegations, it is adjudged by the commission that the claim of the land petitioned is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is hereby made is situated in San Diego County and known by the name of the Valle de San José, and is described and bounded as follows, to wit: Bounded on the east with the

entrance from San Felipe and the mountain and the ravine (Cañada) of Ahuanga; on the north by the mountain, and on the south by the Conescel and the mountains; reference for more particular description to be had to the grant made to said Warner and the map thereon referred to, which are on file in this case; the lands hereby confirmed are intended to be confined to the valley and do not extend beyond the foot of the mountains referred to in the above description and containing six square leagues of land, a little more or less.

ALPHEUS FELCH,
R. AUG. THOMPSON,
S. B. FARWELL,
Commissioners.

Filed in office Oct. 10, 1854.

GEO. FISHER, *Sec'y.*"

Plaintiffs next offered in evidence the notice of appeal by the Attorney-General of the United States from such decree, which is as follows:

OFFICE OF THE ATTORNEY-GENERAL
OF THE UNITED STATES,
Washington, June 13th, 1855.

254. Valle de San José y Aguas Calientes. J. J. Warner, claimant. You will please take notice that in the above case, decided by the commissioners to ascertain and settle private land claims in the State of California in favor of the claimant, and a transcript of the proceedings in which was received in this office on the 9th day of April, 1855, the appeal in the district court of the United States for the south-
97 ern district of California will be prosecuted by the United States.

Very respectfully,

C. CUSHING, *Attorney-General.*

(Endorsed:) "Filed July 21st, 1855. C. E. Carr, clerk, by A. H. Clark, deputy."

Plaintiffs next offered in evidence the decree of the United States district court in the case of J. J. Warner vs. United States, appellant, confirming the action of the board of land commissioners, which is in the language following:

In the United States district court for the southern district of California

J. J. WARNER, APPELLEE,
ads.
THE UNITED STATES, APPELLANT. } Case No. 218, "San José del Valle."

This cause coming on to be heard on appeal from the final decision of the United States board of land commissioners to ascertain and settle the private land claims in the State of California, under an act of Congress approved March 3rd, 1851, on the transcript of the proceedings and decision of said board and of the papers and evidence upon which said decision was founded; and it appearing to the court that the said transcript and notice of appeal have been duly filed according to law, and counsel for the respective parties having been heard: It is ordered,

adjudged, and decreed that the said decision of said commissioners be affirmed, and it is further adjudged and decreed that the claim of the above-named appellee to the land, as described in the grant, is a good and valid claim, and it is ordered, adjudged, and decreed that the same be, and is hereby, confirmed.

The land of which confirmation is hereby made is situated in the county of San Diego and known as the "Valley of San José," and is described and bounded in the original grant and map to which it
98 refers, copies of which grant and map are on file with the papers in this case as follows, to wit: On the east by the entrance from the San Felipe and the mountains; on the west by the mountains and defile of Aguango; on the north by the mountains; the southern limits being the carrisal and mountains; to the extent of six square leagues, provided said quantity of six square leagues be contained within the boundaries; but if there be a less quantity than six square leagues, then the claim of appellee to such less quantity is hereby confirmed.

ISAAC S. K. OGIER,
U. S. District Judge.

(Endorsed:) "Filed Feb'y 13th, 1856. C. E. Carr, clerk. Recorded on page 198."

Plaintiff next offered in evidence the notice, signed by the Attorney-General of the United States, directed to the United States attorney for the southern district of California, notifying him that appeal from such decree would not be prosecuted. Such notice is as follows:

"CALIFORNIA LAND CLAIMS,
"ATTORNEY-GENERAL'S OFFICE,
"*29 September, 1856.*

"SIR: In the case of the claim of J. J. Warner, confirmed to the claimant by the commissioners, case No. two hundred and fifty-four (254), and also confirmed on appeal by the district court, appeal in the Supreme Court will not be prosecuted by the United States.

I am, respectfully, "C. CUSHING.

"PACIFICUS ORD, Esq.,
"*U. S. atty. for the southern dist. of Cal.*"

(Endorsed:) "Filed 24th February, 1857. C. Sims, clk., p. I. H. Coleman, dep."

Mr. WHITE. In so far as my offer comprises the proceedings before the board of land commissioners and the various steps taken
99 anterior to the issuance of the patent, it will depend whether the court sustains the objections heretofore made as to the admissibility of the testimony offered by the defendants as to whether I will press this evidence or not. If the court should hold that the patent itself is conclusive, this evidence would simply be immaterial; it would not do any harm to the case, but would simply encumber the record, and in that event I shall probably ask the court to withdraw it. But I am offering it now to meet the evidence offered.

Mr. WARD. Is this offered to be in in the event that the court rules

that the chain of title up to the final act of the Mexican Government is admissible?

Mr. WHITE. Yes, sir.

Mr. WARD. If the court rules that that evidence is admissible, then this evidence is offered?

Mr. WHITE. Yes, sir.

The plaintiffs then offered in evidence the judgment in the case in the superior court of San Diego County, California, numbered 595, and entitled Francisco Pico vs. J. J. Warner, J. G. Downey, and the Merchants' Exchange Bank of San Francisco, together with a notice of appeal to the Supreme Court in said case, and the appeal bond in said case, remittitur to this court in said case, filed in this court on August 4th, 1887, which case was numbered in the Supreme Court 11,961. The opinion of the Supreme Court in such case, being found on page 19, vol. 73 of the Cal. reports; such record is not inserted here, reference to the decision of the Supreme Court in the volume of California reports cited being deemed ample.

To the introduction of this evidence the defendants objected on the ground that it was incompetent, irrelevant, and immaterial in that the defendants in this action were in no way parties to that action, or
100 bound by that judgment, and the court had no jurisdiction over them, and upon the further ground that the plaintiffs claiming under the patent to Warner were estopped by its recitals that the rights of Warner are based upon the Pico grant as well as upon the Warner grant.

Counsel for plaintiffs stated that this evidence was offered only in the event that the court should hold that the expediente of the Pico grant was admissible. It should otherwise be withdrawn. This evidence being offered merely for the purpose of showing that the Pico grant was abandoned, and that no title passed to Warner thereunder, and that hence any limitation regarding Indian possession, contained in the Pico grant, would have no bearing on this case. The court having decided that the Pico expediente was inadmissible, this evidence was withdrawn.

C. W. GATES was then sworn as a witness on behalf of plaintiffs in rebuttal, and testified as follows:

"My name is C. W. Gates. I reside in Los Angeles; have lived there seven years. I am in the cattle business or stock business. I am familiar with the Warner ranch in this county; have known it since the spring of 1889. I have cattle there under contract with Governor Downey. Mr. Walter L. Vail and I are partners. I have had frequent occasions, since I have been on the ranch, to go near Puerta Cruz and Agua Caliente. My cattle have been pasturing upon that ranch. They have pastured right up to the Indians' fences at Puerta Cruz and the Agua Caliente, and on all sides of them, and a great many times when the fences have not been secure they have pastured inside. There have been no restrictions upon them at any time as to pasturing right up to the Indians' fences. The Indians have killed some of our cattle; they killed them to eat, but never attempted to drive them openly away. We have found the remains; once or
101 twice found Indians in the act of having them down. The instructions we had given to our men was to make the Indians keep their

stock inside of their enclosures, and this had been done in so far as we could get any men to attend to that. Of course it is a very hard thing with one hundred Indians in the neighborhood, by watching them all the time, to keep them away entirely; they will pasture them at night, will slide them out, and in the morning, as soon as daylight, they will bring them in. Whenever we would catch them, my instructions to the men was to corral them, but as long as they were in the enclosures not to molest them. There have been quite a number of Indians' stock taken up by our men, under our authority; I should say eight or ten different times at least. The Indians were notified after they were corralled, and they came and paid the damages and took the stock away. We charged one dollar a head. We have had both stock that belonged to the Indians at Puerta Cruz and Agua Caliente. One particular brand of horses that belonged to one of the Indians at Puerta Cruz—we have had them up twice, and since then the Indians have been pretty careful to keep them in the enclosures, as far as I know. I always pass the Puerta Cruz village on my way to the ranch. The Indians have extended their fences and taken in more land at both places since I have known the ranch. I never measured the amount. At Agua Caliente, I think it was the second year I came there, they built a new fence, the old fence being burned down, and I should judge they took in forty or fifty acres that first time. Then, I think two years ago, or two and a half years ago, they built another one, taking in, I should think, seventy-five or one hundred acres more, making in the neighborhood of one hundred and twenty-five to one hundred and fifty acres in all. At Puerta Cruz I judge they
102 have added, since we have been there, in the neighborhood of ten or twenty acres. At Puerta Cruz I judge there is fenced in altogether seventy-five or eighty acres—fifteen or twenty acres new, I should say. Governor Downey notified them not to extend their fences. I was with him on two or three occasions when they were building their fences, and the governor notified them in person. They stopped building it and closed it up. That was two years ago this summer. I don't know where the stock of the Agua Caliente Indians was captured by our men. All I know is the instructions were whenever they found them out of their enclosure to corral them, and they notified them they had done so, and the Indians got them and paid for them and took them back. I don't know where the boundaries of the land claimed by the Indians are. I instructed my men to corral any stock found outside of the enclosures of the Indians' fences, but do not know of my own knowledge that the stock corralled was obtained while within the exterior boundaries shown upon the map, as claimed by the Agua Caliente Indians, only I saw some of the Indians' hogs within those boundaries that I know the men corralled. In regard to the Puerta Cruz, I know that stock from there was corralled within their exterior boundaries, if those boundaries extended outside of the Indian fences at all. From the map shown me, I can testify that they had captured them outside of those enclosures, and within the lands the Indians claimed there at Puerta Cruz, and that the Indians have paid for such stock in order to get them back. I have seen the stock of the Indians—hogs and sheep and horses—running loose outside of the fences of the Agua Caliente village. We tried to corral them all when we got a chance. I am over to the Agua Caliente nearly every time I go to the

ranch, and until this summer I have averaged a trip there about
103 once a month—sometimes as often as two or three times a month.
Sometimes I am there for a month at a time; sometimes a week; sometimes only a couple of days. I generally try to get over to the Agua Caliente and get washed off—get a bath—and at other times I have gone to see if the stock were being troubled, and in riding to the ranch I ride around the hill outside of the ranch to see if everything is all right, and take that in with the other. When I have been to the Agua Caliente for baths, I have paid the Indians for them.

DANIEL CUNNINGHAM, a witness on behalf of plaintiffs, in rebuttal testified as follows:

"My name is Daniel Cunningham; I reside at Los Angeles; am acquainted with Governor Downey, one of the plaintiffs in this case; am working for him. I have known Warner's ranch since 1871. I have been there frequently every year as Governor Downey's foreman, looking after the ranch and stock. In 1871, '2, '3, and '4 he had sheep, horses, mules and cattle there. I have been at Agua Caliente and Puerta de la Cruz; I have been there generally twice and three times every month, as my business would lead me. Since I have been acquainted with the ranch, the Indians have taken in more or less lands every year. About three years ago, I judge, they took in, I should think, seventy-five or ninety acres at the Agua Caliente in a brush fence; I saw it done and forbid it. A small strip has been taken in at Puerta Cruz—might be perhaps twenty-five or thirty acres—that's guesswork. The Indians at both places have had some stock ever since I have known them. I know the men on the ranch have taken up the stock of the Indians—have corralled the stock of the Indians; about a year ago I helped corral the stock of the Puerta de la Cruz Indians. About last December we took
up some stock of the Agua Caliente Indians several times; we
104 notified them and they came and paid one dollar a head for them.
The stock of the ranch belonging to Governor Downey has run up on both sides all along the enclosures of the Indians, both at Puerta Cruz and Agua Calienta, wherever there might be feed for them, and the Indians have not interfered or prevented our pasturing in this land. It would be a matter of guesswork to say how much of the lands now enclosed at Puerta Cruz was taken in new two years ago—should judge about one-quarter of it."

(Both sides rested and case submitted on briefs to be filed.)

After the case was submitted the plaintiffs obtained leave of the court, against defendants' objection, to amend their complaint, and the same was thereafter amended, and it was stipulated that the answer of defendants on file to the original complaint, and appearing in the judgment roll in this case, be deemed their answer to the amended complaint so filed.

Upon the fifth day of November, 1895, the said case was transferred from department two, presided over by Judge George Puterbaugh, to department three of the said superior court of San Diego County, presided over by Judge W. L. Pierce, such transfer being made upon the court's own motion, on the ground that he felt disqualified, owing to having had some connection with the Warner ranch property.

That upon the twenty-ninth day of December, 1896, the said cause

was decided by the said court through W. L. Pierce, as the judge thereof, and the findings and judgment of said court entered in favor of plaintiffs, all of the objections interposed by plaintiffs to the evidence introduced by defendants having been sustained by said court, and the suf-
105 ficiency or effect of such evidence not being considered or regarded by the court, in rendering its decision.

That thereafter, to wit, on the eighth day of January, 1897, defendants filed in this court, and gave notice to the plaintiffs of their intention to move to set aside the said decision and for a new trial, a copy of which notice of intention to move for new trial, together with defendants' specifications of error, is in the language following:

In the superior court of the county of San Diego, State of California. J. Downey Harvey, administrator with the will annexed of the estate of John G. Downey, deceased (substituted for John G. Downey) et al., plaintiffs, vs. Alejandro Barker et al., defendants. No. 6919.

Notice of intention to move to set aside decision and for a new trial.

You will please take notice that the following named defendants herein, viz: Alejandro Barker, Baleriana Barker, Angela Barker, Vincente Sivimoat, Leon Moro Sivimoat, Canon Sivimoat, Cenciona Sivimoat, Salvador Nolasques, Adolfo Moro, Silvestra Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Solidad Chutnicat, Ceniona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chanate, Francisco Nauwila, Guadalupe Nauwila, Maria Ignacio Nauwila, José Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomaso Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, José Maria Chavez, Pasqual Peloat, Francisca Peloat, José Juan Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpio Rodrigez, Francisco Nawilot, Anastacia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Sllverio Nolasquez, José Antonia Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa,
106 Francisco Loss, José Cecilio, Salvador Gorra, Publicate Lograde, José Meechac, Concenciona Meechac, Valentine Meechac, José Maria Muta, José Antonio Soto, Marcelino Quashish, José Blacktooth, Rosaria Aulingawish, Ramona Sivimoat, Domingo Moro, Andrea Moro, Josefa Blacktooth, Harvacio Chutnicat, Josefa Quashish, and Juan Demati, intend to move this court in the above entitled action, that an order be made and entered therein that the decision of the court heretofore rendered, made, and entered therein, and that the judgment heretofore entered in said action upon said decision be vacated and set aside and that a new trial be granted on the following grounds, to wit:

First. Errors in law occurring at the trial and excepted to by the defendants;

Second. That the decision and judgment is against law;

Third. Insufficiency of evidence to justify the decision and verdict.

Said motion will be based upon the minutes of the court and the pleadings, papers filed, exhibits and evidence in said cause.

And defendants hereby specify the following errors in law, occurring upon the trial of said cause and excepted to by defendants, viz:

A. The court erred in excluding and not admitting in evidence the original expediente of the Warner grant, and also in excluding and not

admitting in evidence the original expediente of the Pico grant, being defendants' Exhibit A, and in excluding from evidence and not admitting the printed copies of such expedientes contained in the printed transcript on appeal in the case of Gage vs. Downey, in the supreme court of California, numbered in that court 14411, beginning at the top of page 67 of such printed transcript and continuing to the bottom of page 75 thereof.

107 See the objections to such evidence and the rulings thereon, page 4 and 5 of transcript.

B. The court erred in excluding and not admitting in evidence the petition of J. J. Warner, filed before the commissioners to settle private land claims in the State of California, being a certified copy, under the seal of the surveyor-general of the United States in and for the State of California, of such petition.

See objection and ruling thereon, page 6 of reporter's transcript.

C. The court erred in excluding and not admitting in evidence the depositions, respectively, of John Foster, M. M. Sexton, and Augustus Harazthy, offered by defendants from the transcript of proceedings in case numbered 254 in the United States district court for southern California, being part of the proceedings in confirmation of the title of plaintiff's predecessor in interest to the premises in controversy, such depositions being marked "Defendants' Exhibit C."

See objections thereto and ruling thereon, page 7 of reporter's transcript.

D. The court erred in excluding and not admitting in evidence the field notes of the final survey of the exterior boundaries of the rancho San José del Valle, confirmed by the United States to J. J. Warner, situated in the county of San Diego, State of California, surveyed by J. C. Hayes, deputy surveyor, July, 1859, being "Defendants' Exhibit D."

See objections thereto and ruling thereon, page 8, reporter's transcript.

E. The court erred in excluding and not admitting in evidence the testimony of Philip Crosthwaite, a witness on behalf of defendants, as to the occupancy by Indians of the lands of the Agua Caliente village, in the year 1850.

108 See objection and ruling thereon, page 10, reporter's transcript.

F. The court erred in sustaining similar objections to the similar testimony throughout the trial.

See reporter's transcript, page 11.

G. The court erred in excluding the evidence offered by defendants, being Mission or Pueblo Indians, and known and recognized as such under the laws of Spain, Mexico, and the United States.

H. The court erred in excluding and not admitting in evidence the testimony offered by defendants going to show that these defendants and their ancestors were in the actual, peaceable, open, notorious, exclusive, and adverse occupancy and use of the premises claimed by them in their answer in this action at the time of the acquisition from the Mexican Government by the United States of the territory embraced in the State of California, and for more than thirty years prior thereto, and especially at the time of the inception of plaintiff's rights under the grant from the Mexican Government upon which the patent under which plaintiff's claim is based, and defendants particularly specify the following instances

of the court's ruling in this effect, viz: The court erred in sustaining plaintiff's objections to and excluding and ruling out the testimony of the following witnesses on behalf of defendants, all tending to show the fact, character, and extent of the use, occupancy, and possession by defendants and their ancestors of the premises in controversy from the time prior to the inception of plaintiff's title from the Mexican Government to the premises in controversy, viz, the evidence of Joseph Swycaffer, pages 13 to 23 of reporter's transcript; testimony of Adolfo Moro, pages 23 to 28, reporter's transcript; the testimony of Machola Moro, pages 28 to 37 of reporter's transcript; the testimony of Leonardo
109 Aulingawish, pages 38 to 45, reporter's transcript; the testimony of Francisco Pico, pages 45 to 48 of reporter's transcript; the testimony of Cecilio Chiporosa, pages 48 to 53 of reporter's transcript; the testimony of Salvador Changalagash, pages 53 to 54, reporter's transcript; the testimony of Marselina Sivimoat (Blacktooth), pages 56 to 59, reporter's transcript; the testimony of Anastacia Nawilot, pages 59 to 61, reporter's transcript; the testimony of Alejandro Barker, pages 62 to 75, reporter's transcript, and the testimony of E. L. Dorn, pages 75 to 95, reporter's transcript.

The court, at the time of the evidence of all of the foregoing-named witnesses on behalf of defendants was offered, reserved its ruling upon the objections made by plaintiff to the admissibility of such testimony, and no specific ruling upon any of such objections has been entered upon the transcript of reporter's notes, but the ruling made by the court upon page 11 of the reporter's transcript was intended, we are informed, to apply to and cover all objections interposed to the admissibility of the testimony of each of such witness in so far as such testimony was in any way directed towards varying, modifying, limiting, or defeating plaintiff's title acquired under the patent from the United States introduced in evidence by plaintiff, the holding of the court being that none of such evidence offered by defendants was admissible to in any way affect or qualify the title vested in plaintiff's predecessor in interest by virtue of such patent, and defendants specify each and all of such rulings as being error.

I. The court erred in excluding and not admitting in evidence defendants' Exhibit G, being the depositions taken upon this trial of the witnesses for defendants, José Maria Avilla, Ygnacio Francisco de la Cruz Garcia, Pio Pico, and J. J. Warner, in so far as the testimony of
110 said witnesses was directed to the character, extent, or duration of use or occupancy of the premises in controversy by defendants or their ancestors, and in so far as the same tended to establish the character of the defendants as Mission or Pueblo Indians. No note, marginal or otherwise, is made upon such depositions to show what particular objections were or what objections were not overruled, but we are informed that the ruling of the court contained upon page 11 of the transcript of reporter's notes was intended to apply to and does apply to all such objections as to the admissibility of such testimony.

J. The court erred in sustaining the objection of the plaintiff to the testimony of Tomasa Nawilot, Sinon Sivimoat, Francisco Nawilot, José Blacktooth, Ysabel Aulingawish, Maria Ygnacia Nuawila, Solidad Chutnicat, Manuelle Sivimoat, all old Indians, defendants in this case, whom

it was stipulated should be considered as having testified on behalf of the defendants at the Agua Caliente village, Warner's ranch; that they have lived there all their lives; that they were nearly grown when Colonel J. J. Warner came on the ranch; that they remember when the American soldiers came through the ranch; that there were as many or more Indians living at Agua Caliente village when they were children than there are now; that they have never been disturbed in their possession of the Agua Caliente; that the cultivation in early times, when Warner came on the ranch and before, by the Indians was less than now; that the present cultivated fields include the old planting grounds except in one or two places; that when Warner came on the ranch and before, the Indians lived mostly on wild-grass seeds, chilla and other seeds, and acorns, wild cherries, tunas, mescal roots, rabbits, squirrels, and rats; that the Indians have always used the water of the hot springs
111 for irrigating, bathing, washing, and for soaking acorns and other seeds to take the bitter taste out of them.

This stipulation was made subject to plaintiff's objections as already reserved, that such testimony was incompetent, irrelevant, and immaterial for any purpose, and could not be permitted to vary, limit, contradict, or in any way defeat plaintiff's title based upon United States patent.

No ruling appears in the record, but we understand that such objection was sustained by virtue of the ruling of the court contained on page 11 of the reporter's transcript, reading, "All similar objections sustained and exceptions taken. W. L. Pierce, judge," being the ruling already referred to, to which ruling we especially except.

K. The court erred in sustaining plaintiff's objections to and ruling out all testimony of the various witnesses of defendants tending to show the pedigree of the defendants and to show that they and their ancestors were Mission or Pueblo Indians.

L. The court erred in sustaining the objections of plaintiff to the testimony of witness Dorn, a witness on behalf of defendants, introduced to show the boundaries of defendants' fields and their possession and occupancy, such objection being the general objection interposed by plaintiff on page 11, reporter's transcript, as to all evidence based upon use or occupancy by the defendants as a foundation of their title. No specific objection is interposed in the record to any specific part of the testimony of said Dorn, but we understand that the whole thereof was excluded under the ruling of the court, upon the general objection interposed by plaintiff on page 11 of reporter's transcript, and we specify such ruling as error, in so far as it applies to any of the testimony of said Dorn.
112 M. The court erred in permitting all of the cross-examination of defendants' witnesses to be withdrawn, such ruling being made upon page 12, reporter's transcript, as directed in the cross-examination of Philip Crosthwaite, and we understand that the same ruling applies to all of the cross-examination of defendants' other witnesses, it having been stated by counsel for plaintiff, at the time of making such cross-examination, that if his objection to the testimony in chief was sustained, then the cross-examination would be withdrawn. We specify the order of the court permitting the withdrawal of the cross-examination of each of the defendants' witnesses as error.

N. The court erred in not sustaining, but in overruling defendants'

objection to the admission in evidence of the judgment in the case numbered 595, Francisco Pico *vs.* J. G. Downey and Merchants' Exchange Bank of San Francisco, together with notice of appeal to the Supreme Court and appeal bond in said case and the remittitur from the Supreme Court of this case filed in this court on August 4th, 1887, which case was numbered in the Supreme Court, 11,961, the report of such decision being in 73 California, page 17.

See defendants' objections thereto, pages 109, 110 of reporter's transcript.

O. The court erred in permitting plaintiff to file amended complaint on the 4th of May, 1894, long after trial of this case had been closed and the same had been submitted to the court.

Plaintiff then and there objected to the filing of such amended complaint so far as paragraph 5 thereof was concerned, which paragraph set forth the derivation of plaintiff's title; such objection was made on the ground that the proposed amendment was made after trial and on the ground that the facts therein set forth were known to the plaintiff
113 at the time of the filing of the original complaint, and on the ground that matter therein contained was immaterial and unnecessary; and the court's ruling in permitting such amendment, the defendants specify as error.

Defendants specify the following respects in which the evidence is insufficient to justify the decision and judgment of the court, viz:

1st. The evidence is insufficient to justify Finding I of the court, "That all of said defendants last above named are Indians and half-breed Indians," in this, that after ruling out and excluding all of the evidence excluded by the court, as hereinabove stated, there was no evidence of any character to show as to whether or not the defendants or any of them were Indians or half-breed Indians.

2d. There is not sufficient evidence to support or justify the Finding II of the court that the plaintiffs are the owners in fee simple of the lands described in said Finding II or any part thereof, except by wrongfully and unlawfully excluding all of defendants' evidence, which was wrongfully and unlawfully excluded by the court, as hereinabove stated.

That defendants specify this finding as being not sustained by the evidence, for the reason that had the evidence introduced by the defendants, and wrongfully excluded, been admitted, the same would have established the fact that plaintiffs were not the owners in fee simple of the property described in paragraph 2 of said findings, but would have established the fact that plaintiff's ownership was subject and subordinate to the continued right of use, occupancy, and possession by defendants of the premises claimed in defendants' answer.

Therefore defendants state that Finding II of the court is not sustained by the evidence, but is contrary to the evidence.

114 3d. Defendants state that there is not sufficient or any evidence to justify that portion of Finding III of the court "that the claims of the defendants and each of them are without right, title, or interest whatever in or to said lands or premises, or any part thereof," in this, that had the evidence offered and introduced on behalf of defendants not been rejected and excluded the same would have shown beyond question that the defendants and each of them are entitled to the continued use,

occupancy, and possession of the premises claimed by them in their answer.

4th. There is not sufficient evidence to sustain or justify that portion of Finding IV of the court which holds that plaintiffs have ownership in fee simple of the lands and premises described in the complaint, in that had the evidence offered and introduced by defendants not been wrongfully excluded by the court, the same would have shown that plaintiffs' title to said premises was subject and subordinate to the continued right to use, occupancy, and possession thereof by the defendants, as in their answer alleged; and for the same reason defendants allege that that portion of Finding VI of the court holding "that said John G. Downey in his lifetime and at the time of his death and the Merchants' Exchange Bank of San Francisco were the owners in fee simple of all of the lands in the complaint described," is not sustained or justified by the evidence.

5th. Finding VII of the court, holding that these defendants are not, and that none of them are, and that their ancestors were not, nor were any of them, at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto, or at all, recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and
115 the United States, and were not in the adverse possession, occupancy, or use of the lands described in said finding VII, is not, and no part thereof is sustained by the evidence, in this: that had the evidence offered by defendants and erroneously excluded by the court, as hereinbefore set forth in the specification of error committed by the court, been admitted, as it should have been, the same taken together would prove and establish the fact that the said defendants are now, and that they and their ancestors were, at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto were, and were recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and the United States, and were, during all of such period, in the adverse possession, occupancy, and use of the premises claimed by them in their answer herein; and that portion of such finding holding that the defendants have never been in the adverse possession, occupancy, or use of any of the lands claimed by them, and have never acquired and did not hold or have any interest or title in said lands, or any part thereof, and that they are not, nor is either of them, in equity or otherwise, the owner or owners of or entitled to the possession, occupancy, or use of the said lands or any of them; but that plaintiffs are entitled to the immediate possession of all said lands, is not nor is any part thereof sustained or justified by the evidence herein, in that had all the evidence offered and introduced by defendants, which was rejected and excluded by the court, as stated in defendants' specifications of error already hereinabove set forth, been admitted, as the same should have been, it would have established the fact that defendants and their ancestors have, for a period beginning as much as thirty years prior to the acquisition of California by the United States
116 from the Mexican Government and continuing to date, been in the adverse possession, occupancy, and use of the lands by them claimed in their answer, and have acquired the right to continue the use, occu-

pancy, and possession of said lands, and every part thereof, and are in equity the owners of and entitled to such right of possession, occupancy, and use of said lands, and that plaintiffs are not entitled to the possession of the same, or any part thereof.

6th. There is not sufficient or any evidence to justify finding VIII of the court that the grant by the Mexican Government to the predecessors of plaintiffs of the lands in the complaint described was not made subject to or in subordination to the rights of the defendants, their ancestors, or predecessors, or any of them, in this: that had all of the evidence offered and introduced by defendants, which was wrongfully and unlawfully rejected by the court, as hereinabove alleged in defendants' specifications of error, been admitted, the same would have shown and demonstrated that all rights of the plaintiffs to the ownership of the property in controversy was subject and subordinate to the rights of the defendants, their ancestors, and predecessors, to the continued use, occupancy, and possession of the premises in controversy.

7th. That findings IX and X of the court are not sustained by, but are contrary to the evidence herein, in the same particulars alleged, and for the same reasons given as to findings VII and VIII.

8th. That findings XI and XII are not sustained by, but are contrary to the evidence in the same particulars, and for the same reasons given as to the findings VII and VIII.

9th. That no portion of finding XVI is sustained by the evidence, in this: that if all the evidence offered and introduced by defendant, which was admissible, had been admitted, and not excluded
117 and rejected by the court, as alleged hereinabove in the specifications of error committed by the court, such evidence would have established and proven that the defendants and their ancestors, at the time of the acquisition by the United States from Mexico of the territory embraced in the State of California, and for thirty years prior thereto, were Mission or Pueblo Indians, and that they occupied and held possession of the lands claimed by defendants in their answer herein, under and by virtue of the laws and regulations of the Government of Mexico, and under a claim of rights so to do, and that they were entitled by said laws and regulations so to use and occupy said lands against all and any parties whatsoever, and that such rights so to use, occupy, and possess said lands by defendants in their answer was established and guaranteed by the laws and regulations of the Mexican Government, at the time of the grant by the Mexican Government to the plaintiffs' predecessors in interest of the lands in controversy, and at the time of the transfer of the sovereignity from the Mexican Government to the United States, and that the United States did, by the treaty of Guadaloupe Hidalgo, and by the general law of nations, recognize and stipulate to protect such right and title of defendants and their ancestors to such use, occupancy, and possession of said lands; and such evidence, had the same been admitted by the court, as it should have been, would have proven and established the fact that the lands claimed by defendants, as described in their answer, were not subject, under the laws of Mexico, to private grant by the Mexican Government, and that the grant or purported grant, upon which plaintiffs' title rests, was subject and subordinate to the continued rights of defend-

ants and their ancestors to the continued use, occupancy, and pos-
118 session of the said premises, and would have further established the fact that the issuing of the patent by the United States Government, under which plaintiffs' claim and the confirmation of the grant, upon which said patent is based, was not intended to convey the lands and premises therein described absolutely without regard to the rights or claims of any of the said defendants, and without being subject or subordinate to any rights or claims of said defendants, but the said patent was issued, and the said grant confirmed, subject and subordinate to the rights and claims of these defendants and their ancestors to remain in the undisturbed use, occupancy, and possession of the said premises, and that the patent, in so far as the same failed to recognize upon its face such right of use, occupancy, and possession, was a cloud upon the title of the said defendants.

The defendants allege that owing to the errors of the court, as hereinabove specifically pointed out, in the rejection and exclusion of defendants' evidence, and owing to the findings of the court, as above specified, being unsupported by the evidence introduced by defendants, which should have been admitted, the decision and judgment of said court is against law.

Wherefore defendants ask that an order be made and entered by the court that the decision by the court heretofore rendered, made and entered herein, and the judgment heretofore entered in this action upon such decision, be vacated and set aside, and that a new trial be granted upon the grounds hereinabove alleged.

Dated this 8th day of January, 1897.

SHIRLEY C. WARD and
FRANK D. LEWIS,
Attorneys for Defendants.

119 *To the plaintiffs herein and their attorneys, Messrs. White & Monroe:*

That said motion for new trial came on for hearing before the court upon the ninth day of February, 1897, and said motion was fully argued, and submitted to the court, the same being heard by Judge E. S. Torrence, as Judge Pierce, who decided the cause, had retired from office, his said term of office having expired, and he was no longer judge of said court.

That upon the presentation and argument of said motion, it was assumed by counsel that all of the objections interposed by plaintiffs to the evidence offered by defendants had been sustained, and all of such evidence held by the court to be immaterial, and that the only question to be passed upon by the court upon such motion for a new trial was as to whether or not the evidence so offered by defendants was material or admissible, to in any way affect, vary, or control the rights of the plaintiffs under the patent from the United States to J. J. Warner, and only such question was presented in the argument of such motion, and the sufficiency of such evidence as was offered by defendants and excluded by the court to establish the position of defendants, as set up in defendants' answer, was in no way controverted upon such argument, and in passing upon such motion the court considered only the question of law as to

whether defendants' evidence was material and relevant, and its sufficiency was in no way considered or gone into.

That upon the twenty-fourth day of April, 1897, the said motion of defendants for new trial of said cause was denied by the court, and a minute entry of such order denying such motion duly entered, and defendants present the foregoing as a correct statement on appeal in said cause.

SHIRLEY C. WARD and
FRANK D. LEWIS,
Attorneys for Defendants.

120 The foregoing statement on appeal proposed and presented within the time stipulated by the parties, the same is correct, and it is agreed the same may be settled by the court as above engrossed.

Dated Oct. 25th, 1897.

SHIRLEY C. WARD &
FRANK D. LEWIS,
Attys. for Defdts.

WHITE & MONROE,
Attys. for Plffs.

This statement settled this 28th day of Oct., 1897.

E. S. TORRENCE, *Judge.*

[Title of cause.]

Copy from clerk's minute book, Saturday, April 24th, 1897.

On this day defendants' motion for a new trial of this cause, heretofore submitted, is by the court denied.

[Title of court and cause.]

Notice of appeal.

You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of the State of California, from the judgment in the above-entitled cause, entered upon the 29th day of December, 1896, in favor of plaintiff and against the defendants in said action, and from the whole thereof, and also from the order of the superior court of San Diego County, denying defendants' motion for a new trial of the said cause, made and entered in the minutes of the said court on the 24th day of April, 1897, and from the whole thereof.

Dated this 22nd day of June, 1897.

Yours, etc.,

SHIRLEY C. WARD and
FRANK D. LEWIS,
Attys. for Defendants.

121 To the clerk of the said superior court and to Messrs. White & Monroe, attorneys for plaintiff.

(Endorsed:) Service of within accepted this 22nd day of June, 1897. White & Monroe, attys. for plff. Filed June 23rd, 1897. Will H. Holcomb, clerk.

Stipulation as to correctness of transcript.

It is hereby stipulated that the foregoing transcript on appeal contains a correct copy of the judgment roll, the statement on appeal, the minute entry of order denying defendants' motion for new trial, and the notice of appeal filed in said cause No. 8324 in the superior court of San Diego County, California. And it is further stipulated that a good and sufficient undertaking on appeal was duly filed in said cause within the time prescribed by law.

MONROE AND WHITE,
Attorneys for Plff.

SHIRLEY C. WARD and
FRANK D. LEWIS,
Attys. for Defts.

122, 123 (Indorsed:) Received copy of within for the judge who tried the case, this day of November, 1897. Will H. Holcomb, clerk. By deputy. Service accepted by copy this 27th day of November, 1897. White & Monroe.

124 Filed October 4, 1899. In bank.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE ESTATE of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco (a corporation), plaintiffs and respondents,
vs.
ALLEJANDRO BARKER ET AL., DEFENDANTS AND appellants.
} L. A. No. 490.

Plaintiffs claim title to the property in controversy through a patent of the United States issued to J. J. Warner January 16, 1880, pursuant to the provisions of the act of Congress of March 3, 1851, entitled, "An act to ascertain and settle the private land claims in the State of California." Defendants claim a possessory right as Mission or Pueblo Indians, and by their answers form three groups, describing severally the tracts of land alleged to be occupied by them, the first consisting of nineteen hundred and seven acres; the second, two hundred and sixty-six and forty-three one-hundredths; and the third, one hundred and twenty acres. They base their right of possession to such tracts of land upon the claim that their ancestors were Mission Indians, and that they have been in continuous occupancy, use, and possession of said premises from time immemorial, and were in such possession at the time the rights of the plaintiffs' grantor accrued under the Mexican Government. At the trial the plaintiffs introduced in evidence the United States patent to Warner, and it was thereupon stipulated that the lands described in said patent included the premises in controversy, and that plaintiffs had succeeded to all the rights of the patentee, and had paid all taxes levied or assessed upon said premises since the patent issued. Thereupon in support of the claim on behalf of the defendants there was offered in evidence the expediente of two grants of the Mexican Government, the first being made June 8, 1840, to Jose Antonio Pico by Juan B. Alvarado, governor of California, and the second made November 28, 1844,

to Juan Jose Warner by Manuel Micheltorena, governor-general of California. The grant to Pico was of the "land known by the name of 'Agua Caliente,' bounded by the ranch of 'San Jose Valle' * * * subjecting himself to pay for the place of worship and other improvements that be there belonging to the San Luis Rey Mission, and not molest (prejudicor) the Indians that thereon may be established, and with the approbation of the most excellent assembly of the department, and the conditions following:

"First. He is allowed to fence it in, without interfering with the roads, crossroads, and other usages (servidumbres); he will possess it fully and exclusively, turning it to agricultural or any other use he may see fit; but within a year he shall construct a house thereon and live in it.

"Second. When the property shall have been confirmed to him, he shall petition the respective judge to give him possession thereof by virtue of this order, and shall mark out the boundaries on whose limits he shall fix the landmarks, some fruit and wild trees that may be of some utility.

"Third. The land of which donation is hereby made is of the extent mentioned in the plan which goes with the 'expedient's.' The judge who should give possession thereof shall have it surveyed according to law, leaving the residue that may result to the nation for their purposes.

"Fourth. If he should fail to comply with these conditions he shall forfeit his title to the land, and it will be denounced by another."

Accompanying the grant to Warner of 1844, offered on behalf of the defendants, are the following papers:

The petition of Warner for the place known by the name as "Valle San Jose," which he alleges is vacant and situated east of the pueblo of San Diego, distant about twenty leagues, and surrounded by mountains.

"To the most R. P. VINCENT OLIVAS:

"With the object of soliciting in property the place known by the name 'Valle de San Jose' (formerly occupied by the mission under your charge), I beg of you to be so kind as to inform me if, at the present day, the mission of San Diego does occupy the said land, and if not, how long since it has been abandoned.

JUAN J. WARNER."

"The 'Valley of San Jose' can be granted to the party who petitions for it, inasmuch as the mission of San Diego, to whom it belonged, has no means sufficient to cultivate and occupy it, and it is not so necessary for the mission.

"FR. VINCENT P. OLIVAS.

"Mission of San Diego, August 5, 1844."

"OFFICE OF THE FIRST JUSTICE OF THE PEACE, SAN DIEGO.

"In view of the petition which the party interested remits to this office, I beg to state that the said 'Valle San Jose' is, and has for the past two years, been vacant and abandoned, without any goods nor cultivation on the part of San Diego; but said place belongs at the present time to the said mission, and at petitioner's request I sign this, in San Diego.

"JUAN MA MARRON.

"August 6, 1844."

The secretary forwarded the papers to the governor as follows:

"GOVERNOR: The land which is petitioned for, it seems that there is no objection to its being granted according to the information which I enclose from the Rev. P. F. Vincent Olivas, and from the judge of San Diego, Juan Marron. The petitioner is a naturalized citizen and is a person of good qualities, so that if your excellency does not dispose otherwise, you can accede to his petition.

"MANUEL JIMENO.

"Monterey, September 2, 1844."

(Same date.)

"Extend to him the title, and I order that he be obliged to procure the plan thereof within four months from this date; and should he fail to comply with such obligation within said term this title will be null and of no value.

"So it ordered and decreed.

"MICHELTORENA."

The deseno, or sketch, accompanying the petition describing the property includes the entire San Jose valley. The grant of Governor Micheltorena recites that, whereas one Jose Warner had petitioned for the land known by the name of "Valley de San Jose," giving the boundaries thereof, and "having previously complied with the notices and investigations on such matters as prescribed by the laws and regulations, exercising the powers conferred on me, in the name of the Mexican nation, I have resolved to grant him the said land, declaring it by these presents his property, subject to the approbation of the most excellent assembly of the department, and to the conditions following, to wit:"

The conditions are similar to those contained in the grant to Pico, with the exception that it omits entirely the clause "not to molest (prejudicor) the Indians that thereon may be established."

Thereupon Warner addressed the governor, stating that he would proceed under the grant, and subsequently commissioners were appointed to make an examination and report. In their report they say: "And it appearing from the said examination that the said concession in favor of Juan J. Warner was made in perfect conformity with what the laws prescribe in this particular * * * the concession is hereby approved in favor of Juan J. Warner of the place named 'Valle de San Jose,' adjudicated in property by the government of this department." This report was subsequently approved by the departmental assembly.

There was also offered on behalf of the defendants the petition of Warner to the land commission, under the act of Congress asking confirmation of his title to the lands in controversy which, it is claimed, was based on the two grants referred to. But Warner in the petition says that he claims by virtue of grants from the Mexican nation a tract of land in the county of San Diego known as the "Valle de San Jose and Agua Caliente;" that so much as is known by the name of Agua Caliente was granted in 1840 to Jose Antonio Pico; that the same had become vested in the petitioner; that the remainder of the tract was subsequently granted to the petitioner in 1844 by Micheltorena; "that said second-named grant was approved and confirmed to the claimant by

an act of the departmental assembly of California, passed on the 17th day of June, 1845. The claimant has no knowledge whether such first-named grant has or has not been so confirmed." By the decree of confirmation recited in the patent it is adjudged that "the land described in the grant" is a good and valid claim, and that said land is "known as the 'Valley of San Jose,' and is bounded and described in the original grant and map to which it refers, copies of which grant and map are on file with the papers in this case, as follows, to wit: On the east by the entrance from San Felipe and the mountains; on the west by the mountains and defile of Aguando; on the north by the mountains, the southern limits being the canisal and the mountains to the extent of 6 square leagues, provided said quantity of 6 square leagues be contained within the boundaries." The patent contained the usual recitals that the said decree had become final, and a survey of the premises thereafter made and approved, and closing with the usual granting clause.

There were offered also on behalf of the defendants certain depositions and oral testimony to the effect that the defendants and their ancestors were Mission Indians, and they had formerly been under the charge of the San Luis Rey Mission, and had been in the exclusive use, occupancy, and possession of the premises in controversy continuously since a time prior to the inception of the plaintiffs' title from Mexico, and had always claimed and exercised the right to so use said property.

To these several offers made on behalf of the defendants, plaintiffs interposed objections on the ground that the evidence offered was incompetent, irrelevant, and immaterial, and that the patent was conclusive as to the title of the patentee. The court reserved its ruling upon such objections, and thereafter sustained the objections and excluded the testimony, to which ruling the defendants excepted. Judgment went for the plaintiffs, and the defendants subsequently moved for a new trial, which motion was denied. The appeal is from the judgment and from the order denying a new trial.

The position of counsel on behalf of the appellants may be summarized as follows:

1. That the patent under which plaintiffs claim specified that it "shall not affect the interest of third persons," and it is claimed defendants are third persons, and are not thereby concluded.

125 2. That the object of the act of Congress of March 3, 1851, was accomplished by presenting, confirming, and patenting Warner's claim to the land in question so as to relieve these defendants of the necessity of presenting their claim to the board of land commissioners.

3. That the decision of the board of land commissioners was not conclusive except against the claimant and the United States Government and parties claiming under the United States Government by title subsequent; as it was not the province of such tribunals to pass upon conflicting titles as between individuals; that they were left just as they existed at the time of the change of sovereignty.

4. That under the Mexican law Warner held the legal title subject to the easement of the Indians' possessory rights, and that the confirmation of the legal title and issuance of the patent in no way changed the character of such title, nor freed it from the easement in favor of the defendants.

5. That in order to constitute one a "third person" under the act of March 3, 1851, it is not essential that he should deraign his title through the same specific grant as the party whose title was presented and confirmed; that it is only essential that the party claiming to be a "third person" should have a superior and anterior title to that confirmed; and the fact that his claim is hostile to the claim confirmed does not preclude the existence of a trust in his favor created by operation of law.

6. That it was not required that the title of the Indians should rest upon a specific grant, but their rights were protected by the general law of the land.

7. That the United States assumed both by its treaty and the law of nations to protect and preserve all existing private property rights within the ceded territory, which it is claimed includes the rights of these defendants.

To sustain such claims the appellants rely upon Byrne vs. Alas, 74 Cal., 628. It was stipulated in that case that the defendants were Mission or Pueblo Indians; that their ancestors and predecessors had been in the continuous, open and notorious, peaceable, and exclusive possession, occupancy, and use of the premises in controversy, claiming adversely to all the world, ever since and for a long time prior to the establishment of the Mexican Republic; and that their claim had not been presented for confirmation under the act of 1851; and that the premises were included within the exterior boundaries of the Mexican grant of the San Jacinto Rancho, and patented to Estidillo, from whom plaintiff derives title; and it was expressly provided in that grant that "he [Estidillo] shall in no way disturb or molest the Indians who are established or living thereon at the present time."

In the opinion of the court in that case it is said: "The patentee and his grantee under the law and the terms of the grant took the fee, subject at least to the right of occupancy by the Indians; and those rights are still preserved unless the Indians forfeited them by failure to present their claims to the board of land commissioners appointed by the act of March 3, 1851." After reviewing the history of the Indians under the Spanish and Mexican Governments, and their treatment by such Governments, particularly mission or pueblo Indians, the opinion proceeds: "It becomes necessary to inquire to what extent, if at all, the confirmation of the Estidillo grant and the United States patent affected the claim of these defendants. The fifteenth section of the act of March 3, 1851, provides that the decree or any patent issued under the act shall be conclusive between the United States and claimants only, and shall not affect the interests of third persons. Under this clause the rights of the Indians were preserved without presenting their claims. * * * The patent, therefore, passed the legal title to the patentee burdened with whatever equities existed at the time of the cession of California in favor of third persons. Under the treaty the Government of the United States stood in the place of the Mexican Government. Its patent confirmed the grant, proclaimed it to be good, neither added to nor detracted from it in any way. It left the title of Estidillo just as it was at the time of the treaty, so far as the Indians were concerned, and it remained thereafter as to them just as it would have remained if the treaty had not been made. If the Indians were

entitled to possession before the date of the patent they were entitled to it afterwards, so long as any of the community remained in actual possession. So far as we have been able to learn, nothing remained for them to do under the laws of Spain or Mexico to complete their rights of possession. Neither was there any act or writing required on the part of the Government. Their right was, therefore, complete." Referring to section 16 of the act of March 3, 1851, which reads "that it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians and those who are engaged in agriculture or labor of any kind, also those which are occupied and cultivated by pueblo or rancheros Indians," the court adds: "This language indicates that Congress did not intend that the rights of the Indians should be cut off by a failure on their part to present their claims, but that it should be the duty of the commissioners to ascertain and report the tenure by which they held their lands."

The case under consideration, it will be seen, differs materially from that of Byrne vs. Alas. Here it is shown that by the investigation of the Mexican officials and their reports, together with the grant to Warner, the land, some portions of which had formerly been occupied, was vacant and unoccupied at the date of the grant, and in the grant the clause in reference to the rights of the Indians is omitted entirely. At the time of the Pico grant, four years before, there may have been some mission or pueblo Indians at the Agua Caliente, covered by that grant. The later grant, as already stated, embraced the whole valley; and this was the grant which was confirmed and patented, as clearly appears from the papers offered in evidence on the part of the defendants. This is also shown by the case of Pico vs. Warner, 78 Cal., 17. In the opinion in that case it is said: "The findings are in substance as follows: On the 8th day of June, 1840, the governor of California granted to José Antonio Pico a tract of land known as the Agua Caliente, to the extent of four square leagues, the same being a part of the Valle de San José, which contains about ten square leagues, and is now situated in San Diego County. On the 28th day of November, 1844, the governor of California granted to the defendant J. J. Warner the tract of land known as the Valle de San José to the extent of six square leagues." The court further says that the Pico grant was rejected and the Warner grant confirmed, and add: "In pursuance of the comfirmation of the Warner grant the United States, on the 20th day of February, 1880, issued to Warner its patent for the premises described in the complaint, including the Agua Caliente tract and other lands not embraced in the Pico grant."

It is useless for counsel on behalf of appellants to contend that the Warner grant is the same as the Pico grant in reference to the rights of the Indians. Not to interfere with roads and other usages (servidumbres), under the circumstances, can not be tortured into the equivalent of a reservation in the grant to "not molest (prejudicor) the Indians that thereon may be established."

The grant to Warner neither reserved nor preserved any possessory or other right or supposed right in the Indians; and the reason of the difference between the two grants in this regard is obvious. The record shows that before the Warner grant was issued an investigation was had

by the proper Mexican officers, who reported "that the said 'Valle San José' is and has for the past two years been vacant and abandoned," and could be granted, "inasmuch as the mission of San Diego, to whom it belonged, had no means sufficient to cultivate and occupy it, and it is not so necessary for the mission."

Any arguments based upon the asserted rights of the mission or pueblo Indian under the Spanish or Mexican régime—and much of the argument on the part of the appellants is on this line—is entirely irrelevant in this case, as the grant under consideration did not interfere with any such alleged rights. Therefore if it were permitted to go behind the patent to the grant itself, there was no defense on the part of the appellants to the plaintiffs' action.

But we are not permitted to go behind the patent in a case like this, and in the light of more recent decisions, both by this court and by the United States courts, Byrne vs. Alas can no longer be considered as authority, more especially as to the consequences resulting from the non-presentation of claims of title to land arising under the laws of Spain or Mexico, and the scope and effect of patents based upon such claims of title.

In Minturn vs. Brower, 24 Cal., 644, it was held that claims founded on perfect titles—that is, such titles as require nothing further to be done at the date of the change of sovereignty—need not be presented for confirmation, under the act of Congress of 1851. And this seems to have been the theory up to the time of Byrne vs. Alas. In consequence it is there held that an Indian title, such as this is claimed to be, namely, the right for themselves and descendants perpetually to possess, use, and occupy the land—without, however, the right of alienation—was a right or title prior and superior to any grant, and could be asserted successfully against such grant, or the patent issued thereon. The court say: "Under the treaty the Government of the United States stood in the place of the Mexican Government. Its patent confirmed the grant, proclaimed it to be good, neither added to nor detracted from it in any way." At the time or just prior to the decision in Byrne vs. Alas, Phelan vs. Poyoreno, same volume (74 Cal., 448), was also decided. In that case the plaintiff claimed under a patent issued upon a confirmed Mexican grant, and the defendants under a grant which was alleged to have conveyed a perfect title, but it had not been presented for confirmation. The judgment below went for the plaintiff, but this court held the unconfirmed grant to be superior in right to the patent, and reversed the judgment. The court there say: "Holders of titles to lands in the ceded territory which were perfect at the date of the treaty could, if they so elected, present them to the commission for confirmation, but were not bound to do so." At the same term Dominguez vs. Botiller, 74 Cal., 457, was decided "upon the doctrine enunciated and for the reasons given in Phelan vs. Poyoreno, ante, page 448."

This latter case, by a writ of error, went to the Supreme Court of the United States, the error assigned being that this court erred "in holding that under the said act of Congress of March 3, 1851, it was not necessary for each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Governments to present such claim to the board of land commissioners under said act."

After a full and thorough discussion of the questions involved, the judgment of this court was reversed. Botiller vs. Dominguez, 130 U. S., 238.

In Beard vs. Fedrey, 3 Wall., 478, the contention was similar to that of the appellants, and the court there say: "The position of the defendants is that as against them the patent is not evidence for any purpose; that as between them and the plaintiff the whole subject of title is open precisely as though no proceedings for the confirmation had been had and no patent for the land had been issued. Their position rests upon a misapprehension of the character and effect of the patent issued upon the confirmation of a claim to land under the laws of Spain and Mexico.

126 In the first place, the patent is a deed of the United States. As a deed its operation is that of a quitclaim, or rather a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when the proceedings were instituted by the filing of the petition before the board of land commissioners. In the second place, the patent is a record of the action of the Government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights and were entitled by the law of nations to protection under them to the same extent as under the former Government. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded was, of course, political in its character and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3, 1851, they had declared the manner and terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to lands are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the Government; authorized appeals from the decisions of the tribunal, first to the district and then to the Supreme Court, and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed by the action of its tribunal and officers that a claim asserted is valid and entitled to recognition, the Government acts and issues its patent to the claimant. This instrument is therefore record evidence of the action of the Government upon the title of the claimant. By it the Government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty and might have been located under the former Government, and is correctly located now so as to embrace the premises as they are surveyed and described. As against the Government, this record, so long as it remains unvacated, is conclusive. It is equally conclusive against parties claiming under the Government by title subsequent. It is in this effect of the patent as a record of the Government that its security and protection chiefly lie." The court further defines the meaning of "third persons," mentioned in the fifteenth section of the act of 1851, whose rights are reserved in all patents issued under such act, as follows: "The term 'third person,' as there used, does not embrace all persons other than the United States and the claimant, but only those who hold superior titles, such as will enable them to resist successfully any action

of the Government in disposing of the property." The opinion in this case has been frequently quoted and approved in subsequent cases by the same court. In Knight vs. U. S. Land Association, 142 U. S., 201, property is defined: "And by the term property, as applied to land, all titles are included, legal or equitable, perfect or imperfect."

In Houston vs. The City and County of San Francisco, 47 Fed. Rep., 337, Justice Field, in rendering the opinion of the court, said: "The alleged grant, if one ever existed, was not presented for examination and confirmation to the board of land commissioners for the settlement of private land claims in California under the act of Congress of March 3, 1851. The land embraced within the alleged grant thus became by the express declaration of Congress in that act, which was passed to carry out our treaty obligations with Mexico, and by the decisions of the Supreme Court of the United States thereon, public land no longer subject to any private ownership by virtue of the grant."

In More vs. Steinbach, 127 U. S., 80, after referring to the act of Congress and quoting former decisions in reference to Mexican grants, the court say: "The doctrine invoked by the defendants that the laws of the conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until change be made, does not aid their defense. That doctrine is not applicable to laws concerning the alienation of any portion of the public domain, or to officers charged under the former Government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject."

In this case, therefore, if any rights whatever can be conceded to the appellants under the former Mexican Government, such rights were in the nature of private property, or a right dependent upon the will and pleasure of the State or nation. If, as claimed, it were a right to possess, occupy, and use land, that amounted to a title to property. It being a title or right to property, whether in fee simple or possessory merely, derived from the Mexican Government, under the act of Congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation. If, on the other hand, it were a mere license at the pleasure of the former Government to occupy the land, such right would not prevent that Government from granting the land unencumbered with such right. This was the case in reference to pueblos under the former regime. The pueblos held title in trust for the use of the inhabitants, not conferred by special grant but under the laws and regulations of Spain and Mexico, and there were many cases where such governments made specific grants within the territorial limits of the pueblos which were, after the change of government, confirmed and patented by the United States under the act of Congress of 1851. The United States, succeeding to all the rights and sovereignty of Mexico, had such power to grant all public lands; that is, all lands not claimed by private parties, and if owned or claimed by private parties and not presented for confirmation the claims were waived or forfeited and such lands thereafter became public lands.

"The ascertainment of existing claims was a matter of vital importance to the Government in the execution of its policy respecting the public lands, and Congress might well declare that a failure to present a claim should be deemed an abandonment of it, and that the lands covered by it should be considered a part of the public domain." Again, "The power to decide upon the validity of any claim presented to land in California by virtue of any right or title derived from the Spanish or Mexican government as matter of original jurisdiction is by the act of 3rd of March, 1851, exclusively conferred upon the commissioners appointed under the first section of that act." Further, "The effect of the inquiry and decision of these tribunals upon the matter submitted is final and conclusive. If unfavorable to the claimant the land 'shall be held and considered as a part of the public domain of the United States,' but if favorable the decrees rendered by the commissioners or the courts 'shall be conclusive between the United States and the claimants.' These acts of Congress do not create a voluntary jurisdiction that the claimant may seek or decline. All claims to lands that are withheld from the board of commissioners during the legal term for their presentations are treated as nonexistent and the land as belonging to the public domain." And, "Claims, whether grounded upon an inchoate or a perfect title, were to be ascertained and adequately protected." United States vs. Castillero, 2 Black, 17; Newhall vs. Sanger, 92 U. S., 761; More vs. Steinbach, supra; Botiller vs. Dominguez, supra.

Appellants' counsel, to ward off the effect of these decisions, particularly the Botiller case, characterize much of the language used in such opinions as pure dictum. But the opinion in this latter case as well as the others quoted have been referred to and adopted by the same court in subsequent cases. In Knight vs. U. S. Land Association, supra, the court say: "The patent being thus conclusive can only be resisted by those who hold paramount title to the premises from Mexico and antedating the title confirmed." De Guyer vs. Banning, 167 U. S., 723.

When unable to meet and answer opinions of the court, it is a custom of counsel, which would be "more honored in the breach than in the observance," to characterize the language used as mere dictum. The answer to such criticism is well stated in the Botiller case itself: "We are unable to perceive any sufficient reason for calling these expressions of the court, whose judgment must be final on the subject, dicta, for we feel bound to say that they were observations pertinent to the matter under consideration and seem to have met the entire approbation of the court in whose behalf they were uttered, and as they embrace a very considerable period of time, during which a contrary opinion would have saved much labor to the court, we must believe that the opinions thus expressed without variation were the well-considered views of this court when they were delivered."

Many of the questions raised here were presented in the case of Los Angeles F. & M. Co. vs. Thompson, 117 Cal., 594. The plaintiffs there relied upon a patent issued on the confirmed grant of the ex-Mission San Fernando. The defense offered to show that the grant was void for the reason that it was an attempted grant of mission lands reserved from and not subject to grant under the laws and regulations of the Mexican

Government, and that the board of land commissioners had no jurisdiction over the subject-matter, and that the decree of confirmation was therefore void. Upon the objection of the plaintiff the evidence was excluded, and this ruling of the court was the principal error assigned. This court, in affirming the judgment in favor of the plaintiff, reviews to some extent the cases already referred to and says: "The board of land commissioners was authorized to adjudicate upon the validity of every claim for land in California which purported to be derived from the Spanish or Mexican Government. The validity of the claim included the authority of the governor to make the grant as well as the existence or effect of the laws of Mexico concerning the same, and the jurisdiction of the board extended to the determination of each of these questions as fully as to determining whether there had been a compliance with the forms of law in making the grant, and its judgment thereon can not be collaterally assailed on account of any error it may have committed in reference thereto." This case, aside from the cases from the United States courts already referred to, affords a complete answer to the contention that the land being occupied by the Indians could not be granted under the laws of Mexico.

But it is claimed that Warner took his title subject to the trust or right of the Indians. Neither the grant nor the patent contains anything to support this contention, and there is no privity between them and the grantee, or anything from which a trust could arise in their favor as against his grant or the patent issued thereon. They are not third persons within the meaning of the fifteenth section of the act of 1851, as already shown, but are mere strangers to the record.

But it is contended that if the Indians are not third "persons" within the meaning of section 15 of the act of 1851 they are protected by section 16 of that act. By that section it is simply made the duty of the commissioners to report the status of the Mission Indians to Congress, so that that body might be able to provide for their future government and to treat them equitably and in accordance with the general policy of the United States. It would appear from that section that the Indians were treated as dependent upon the care and generosity of the Gov-
127 ernment and were not classed as Mexican citizens who held rights to property. The presumption is that the proper inquiry or investigation was had and reported by the proper officers, as required by law, prior to the confirmation of the Warner grant. From the foregoing it follows:

1. That the decision of the land commissioners and other appropriate officers of the Government of the United States, holding to the effect that the land in question was at the time it was granted vacant and subject to absolute alienation, is conclusive on the defendants and all others.

2. That the grant to Warner of the "Valle de San José" was not subject to any right or interest in the defendants, but that he claimed and held the land granted in hostility to the defendants' pretensions, and there is no trust relation existing between Warner and the said Indians.

3. That the patent issued to Warner upon the confirmed grant to the premises in controversy is conclusive against the defendants.

The judgment and order denying a new trial are affirmed.

VAN DYKE, J.

We concur:

HARRISON, J.
GAROUTTE, J.
HENSHAW, J.

DISSENTING OPINION.

I dissent. The case presented by this record can not, in my opinion, be distinguished in any material respect from Byrne vs. Alas, 74 Cal., 628.

It is true the grant to Warner, under which the appellant claims, did not contain the provision quoted from the Estudillo grant (74 Cal., 635), that "he shall in no way disturb nor molest the Indians who are established or living thereon at the present time," but it was an express condition of the Warner grant that he should not interfere with the roads or other "servidumbres," and it appears from the authorities cited by appellant that the word servidumbres had a meaning in Spanish law broad enough to include the servitude corresponding to the right of occupancy claimed by these defendants as successors of the Christianized mission Indians, who, according to the evidence excluded by the superior court, were established and living upon some, at least, of the lands in controversy long before the date of the Warner grant.

The claim that our decision in Byrne vs. Alas has been overturned by subsequent decisions of the Supreme Court of the United States is, I think, unsupported by the cases cited by counsel, and in the absence of controlling authority I am unwilling to depart from the doctrine established here upon mature consideration.

BEATTY, C. J.

DISSENTING OPINION.

I dissent. In addition to what is said in the dissenting opinion of the chief justice, I think that the privileges of the Indians would have been preserved even if, in the grant to Warner, there had been no express words of reservation which could be construed as including them—if there had been no express reservation whatever. I think that under the general law applicable to the subject—written and unwritten—running back through Mexican and Spanish dominion to the sixteenth century, the legal title to the lands like those in question here, always passed subject to the right of the Indians to occupy them as they had been accustomed to "in such manner as that they shall not stand in need of the necessaries of life." See Byrne vs. Alas, 74 Cal., and the authorities there cited. I do not think that they were required to present their claims to the land commission, or that they are even to be charged with knowing that there was such a commission, or with a knowledge of the law generally. They are mere wards of the nation, and it is to be presumed that the nation has always recognized and protected their customary rights, and that all

its grants are made with the understanding that the grantees know those rights, and take subject to them.

McFARLAND, J.

I concur:

TEMPLE, J.

128 In the supreme court of the State of California.

L. A. No. 490. Bank.

J. DOWNEY HARVEY, ADM., ETC., MERCHANTS Exchange Bank of S. F., resp.,
vs.
ALLIJANDRO BARKER ET AL., APPELLANTS.

On appeal from the superior court in and for the county of San Diego.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Van Dyke, J. We concur: Harrison, J.; Garoutte, J.; Henshaw, J.

Dissenting opinion, Beatty, C. J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of San Diego in the above-entitled cause be, and the same are hereby, affirmed.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 4th day of October, 1899, and now remaining of record in my office.

Witness my hand and the seal of the court affixed at my office this 4th day of November, A. D. 1899.

[SEAL.]

GEO. W. ROOT, *Clerk.*
By J. J. DUNCAN, *Deputy.*

(Indorsed:) L. A. No. 490, in the supreme court, State of California. Remittitur. Harvey et al. adm., etc., vs. Barker et al. Clerk's costs, $. Paid by appellant, $12.50. Paid by respondent, $. Total, $12.50. Geo. W. Root, clerk. By J. J. Duncan, deputy.

129 Supreme Court of the United States.

ALLEJANDRO BARKER, BALERIANA BARKER, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Molasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Nauwila, José Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, José Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomasa, Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isidora Pena, José Maria Chavez, Pasquel Peloat, Francisca Peloat, José Juan Oulingawish, Cecelio Tashwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawilot, Anastasia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonia Sivimoat, Rosaria Oulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, José Cecilio, Salvador Gorra, Publicate Logrede, José Meechao, Concenciona Meechao, Valentin Meechao, José Maria Mata, José Antonio Soto, Marcelino Quashish, Josefa Quashish and Juan Deneati, plaintiffs in error,

vs.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco, a corporation, defendants in error.

In error to the supreme court of the State of California.

Assignments of error.

130 Now come the plaintiffs in error and, for assignment of error in this case, allege that the supreme court of the State of California, in giving its decision and judgment in the above-entitled cause, did commit error as follows, to wit:

ASSIGNMENT OF ERROR NO. 1.

This is an action to quiet title to and recover possession of certain lands in San Diego County, California. The plaintiffs assert title to the lands in controversy under and by virtue of a United States patent based upon two confirmed Mexican grants; such patent having been issued under and in pursuance of proceedings had under the act of Congress of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

The defendants in possession claim to be Mission Indians, and, that they have been in the possession, use, and occupancy of these lands ever since a time long prior to the date of the Mexican grants upon which plaintiffs' title is based, and that during all of such time they have claimed the right so to use, occupy, and possess such property as against all the world, without, however, the right to dispose of the same; and they claim that under and by virtue of the Spanish and Mexican law existing in the ceded territory prior to the transfer of sovereignty to the United States, Indians such as these were entitled for themselves and their descendants to the continued use and occupancy of the lands of which they were possessed and which they were using, so long as they or any of their descendants remained in such possession and use, without,
131 however, having the power of alienation; and all private grants of such lands made by the Mexican Government were under the law subject to such general right of use and occupancy in the Indians, although the grants including such lands were silent upon this subject. Defendants further claim, however, that in the grant upon which plaintiffs' title rests the defendants right to continued use and occupancy of these lands was expressly preserved and protected; they claim that, under and by virtue of the provisions of the treaty of Guadalupe Hidalgo between the United States and the Government of Mexico, their usufructuary rights in these lands were preserved and protected. Defendants never presented their claim to their usufructuary rights in these lands to the board of land commissioners, appointed under the act of Congress of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and it is their claim that they were relieved of the necessity of presenting their claims to such board, for the reason that the sole purpose of the act of Congress in question was to segregage private property from public domain and to fix the boundaries of each, and that proceedings had and patents issued thereunder were binding upon the United States and the claimant only, and upon parties claiming under the United States by title subsequent to the change of sovereignty, but were not binding upon third persons claiming an interest in the lands by a right or title prior and paramount to that confirmed and patented. And defendants claim that the requirements of such law as to these lands were fully met and complied with, and such lands adjudged to be private property, and not a part of the public domain by the presentation to the board of land commissioners of the claim
132 of one Juan J. Warner therefor (plaintiffs' predecessor in interest, the original grantee from the Mexican Government), and by the confirmation and patenting of such claim that this vested the legal title in Warner and operated to relieve the defendants from the necessity of presenting their claims to such board, but did not change the character or extent of Warner's claim or title, but the same remained just as formerly subject to the usufructuary rights of the defendants and charged with all of the lawful uses and subject to all of the lawful trusts previously existing. That the defendants are "third persons" as such term is used in the 15th section of the statute in question, whose rights are not concluded by proceedings had thereunder. That as under the Mexican regime the grantee held the legal title in trust for the defendants who were the beneficial owners entitled to the use and enjoyment of the lands,

this relation of privity of estate and trust was not cut off or extinguished by confirmation and patent to the grantee Warner. Defendants further claim that they were wards of the Mexican nation, and by the transfer of sovereignty became and ever since have been wards of this nation, and that it was not intended that they should be compelled to present their claims to the board of land commissioners for confirmation under penalty of forfeiture for failure so to do.

Plaintiffs on the other hand claim that their patent from the United States is conclusive of the entire controversy, and that all evidence as to the defendants being Mission Indians, or as to their ancient and continued use, occupancy, and possession of these lands, is immaterial and
133 inadmissible, and all of such evidence was objected to on that ground. All testimony of defendants was introduced under such objections of plaintiffs and was permitted temporarily to be received, but such objections thereto were subsequently after the cause had been submitted, sustained, and all of such testimony of defendants stricken out and judgment given for plaintiff, and defendants' motion for a new trial denied. This position has been sustained by the supreme court of California, Chief Justice Beatty and Justices Macfarland and Temple dissenting, the majority of said court having held that the patent to plaintiff's predecessor in interest was conclusive of the entire controversy, and that all claims of the defendants were lost by not being presented for confirmation to the board of land commissioners appointed under the act of Congress above mentioned; that defendants were not third persons whose rights were protected under the 15th section of such act of Congress, but were mere strangers to the title, and that all evidence as to the former property rights of such defendants and their ancestors under the Mexican law was therefore immaterial, inadmissible, and properly stricken out.

Plaintiffs in error claim that the supreme court of California committed error in its judgment as follows:

First. In holding that the patent under which plaintiffs below, defendants in error here, held title, was conclusive of the entire controversy between the parties.

Second. In sustaining the decision of the trial court excluding all of the evidence of the defendants below, plaintiffs in error, showing
134 their rights under the Mexican law in the lands in controversy.

Third. In holding that all claims, including those of Mission Indians to property in California derived from the Spanish or Mexican Government, were lost if not presented to the board of land commissioners for confirmation under the act of Congress of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

Fourth. In holding that defendants below, plaintiffs in error, were strangers to the title and not "third persons" under the 15th section of the act of Congress of March 3rd, 1851, above referred to.

Plaintiffs in error claim that the error committed by the supreme court of the State of California in its judgment as aforesaid is reviewable by this court, on the ground that the judgment of said supreme court of California is against the title, right, privilege, and exemption specifically set up and claimed by plaintiffs in error under the treaty between the United States and Mexico, known as the treaty of Guadalupe Hidalgo,

and under the act of Congress of the United States of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

ASSIGNMENT OF ERROR NO. 2.

The assignments of error in the decision of the trial court—the superior court of San Diego County, California—upon defendants' motion in said court for a new trial of said cause, the same appearing in the tran-
135 script on appeal from said lower court to the supreme court of the State of California, are each and all well taken, and constitute good and sufficient grounds for the reversal of said trial court by the supreme court of the State of California; and each and every assignment of error contained in such transcript on appeal—both as to errors of law occurring at the trial and duly excepted to, and as to specifications of the insufficiency of the evidence to justify the decision and judgment of the court—are hereby reiterated and deemed repeated as a portion of this assignment of error in the judgment and decision of the supreme court of the State of California, as fully as if the same had been here repeated in full, reference being made to such transcript on appeal for a full statement thereof.

Wherefore plaintiffs in error allege that in the particulars set forth in such assignments of error in said transcript on appeal contained, the judgment of the supreme court of the State of California affirming the decision of the trial court, is error reviewable by this court, in that it is against the title, right, privilege, and exemption specifically set up and claimed by plaintiffs in error under the treaty between the United States and Mexico, known as the treaty of Guadalupe Hidalgo, and under the act of Congress of the United States of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

Wherefore plaintiffs in error pray that the said judgment of the
136 supreme court of the State of California against them rendered on the 4th day of October, 1899, may be reversed and that judgment be rendered for plaintiffs in error as prayed for in their original answer filed in said cause.

SHIRLEY C. WARD,
FRANK P. FLINT,
FRANK D. LEWIS,
Attorneys for Plaintiffs in Error.

137 In the supreme court of the State of California.

J. DOWNEY HARVEY, ADMINISTRATOR, ETC., ET AL., plaintiffs and respondents,
vs.
ALLEJANDRO BARKER ET AL., DEFENDANTS AND appellants.
} L. A. No. 490.

Petition for writ of error.

Defendants in the above entitled cause feeling themselves aggrieved by the judgment entered therein upon the 4th day of October, 1899,

come now, by Frank P. Flint, United States attorney for the southern district of California, Shirley C. Ward, and Frank D. Lewis, their attorneys, and petition the court for an order allowing said defendants to prosecute a writ of error to the honorable United States Supreme Court under and according to the laws of the United States in that behalf made and provided; and such writ of error having been directed to be taken to the United States Supreme Court by the Department of Justice of the United States and no bond in such case being required by law, and all bond having been specially waived by stipulation of the plaintiffs on file herein, which said stipulation consents that writ of error herein shall operate as a supercedeas, it is therefore asked that all further proceedings in this court be suspended and stayed until the deter-
138 mination of said writ of error by the United States Supreme Court.

And your petitioners will ever pray.

SHIRLEY C. WARD,
FRANK D. LEWIS,
FRANK P. FLINT,
Attorneys for Defendants.

(Indorsed:) L. A. 490. Filed Nov. 6, 1899. Geo. W. , clerk; by C. W. Johnson, deputy.

139 In the supreme court of the State of California.

J. DOWNEY HARVEY, ADMINISTRATOR, ETC., ET AL., plaintiffs and respondents,
vs.
ALLEJANDRO BARKER ET AL., DEFENDANTS AND appellants.
} L. A. No. 490.

Order allowing writ or error without bond.

Upon filing petition for writ of error in the above-entitled cause, and on filing an assignment of errors, it is ordered that a writ of error be and is hereby allowed to have reviewed in the United States Supreme Court the judgment heretofore entered herein; and such writ of error having been directed to be taken by the Department of Justice of the United States, and plaintiffs having filed herein a stipulation in writing waving all bond and consenting that writ of error shall operate as supercedeas staying execution of the judgment in this cause until the writ of error was finally determined by the United States Supreme Court, it is therefore ordered that the writ of error hereby allowed shall operate as a supercedeas and shall stay execution of the judgment of this court pending the action of the Supreme Court of the United States thereon.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

(Indorsed:) L. A. 490. Filed Nov. 6, 1899. Geo. W. Root, clerk. By A. W. Johnson, deputy.

140 [Citation.]

UNITED STATES OF AMERICA, ss.

To J. Downey Harvey, administrator of the estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco, a corporation, defendants in error, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Allejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, José Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, José Blacktooth, Inez Blacktooth, Salvador Changagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Oulcot, Isadora Pena, José Maria Chavez, Pasquel Peloat, Francisca Peloat, Jose Juan Oulingawish, Cecelio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawilot, Anastasiä Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, José Antonio Sivimoat, Rosaria Aulingawawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecelio Chiporosa, Francisco Loss, José Cecelio, Salvador Gorra, Publicata Logrede, José
141 Meechao, Concenciona Meechao, Valentin Meechao, José Maria Muta, José Antonio Soto, Marcelino Quashish, Josefa Quashish, and Juan Demati, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable W. H. Beatty, chief justice of the supreme court of the State of California, this the 6th day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

142 Due service and receipt of a copy of the within and foregoing citation admitted this 10th day of November, A. D. 1899.

WHITE & MONROE,
Attorneys for Defendants in Error.

Due service and receipt of a copy of the within and foregoing citation admitted this 13th day of November, A. D. 1899.

J. DOWNEY HARVEY,
Administrator, etc., Defendant in Error.
THE MERCHANTS' EXCHANGE BANK
OF SAN FRANCISCO,
WM. A. M. VAN BOKKELA, *Sec.*,
Defendant in Error.

143 (Indorsed:) In the Supreme Court of the United States. Allejandro Barker et al., plaintiffs in error, vs. J. Downey Harvey, administrator, etc., et al., defendants in error. (Original.) Citation.

144 In the supreme court of the State of California.

J. DOWNEY HARVEY, ADM., ETC., ET AL., RESPONDENTS,
vs.
ALLEJANDRO BARKER ET AL., APPELLANTS. } L. A. 490.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of transcript opinion of the court, judgment, assignment of errors, petition for writ, order allowing writ without bond, original writ, and original citation, pages 1 to 143, inclusive, the same constituting the papers on writ of error in the above-entitled action, as shown by the records of my office.

Witness my hand and the seal of the court, this 18th day of November, 1899.

[SEAL.]

GEO. W. ROOT, *Clerk.*
By A. W. JOHNSON, *Chief Deputy.*

145 (Indorsed:) L. A. 490. In the supreme court, State of California. Harvey, adm., etc., et al., vs. Barker et al.

145 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the honorable judges of the supreme court of the State of California, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. Downey Harvey, administrator of the estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco, a corporation, plaintiffs, and Allejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenoiona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changalagash, Tomasa Nowilot, Francisco Anderson, Pasquala Anderson, Margarita Oulcot, Isadora Pena, Jose Maria Chavez, Pasquel Peloat, Francisco Peloat, Jose Juan Oulingawish, Cecilio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat,

146 Policarpia Rodrigez, Francisco Nawilot, Anastasia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Savivil, Francisca Chutnicat, Silverio Nolasquez, Jose Antonia Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona

Chavez, Ambrose Ortega, Cecilio Chiporosa, Francisco Loss, Jose Cecilio, Salvador Gorra, Publicate Lograde, Jose Meechac, Concenciona Meechac, Valentin Meechac, Jose Maria Muta, Jose Antonio Soto, Marcelina Quashish, Josepha Quashish, and Juan Demati, defendants, wherein was drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Allejandro Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivi-
147 moat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, Jose Maria Chavez, Pasquel Peloat, Francisca Peloat, Jose Juan Oulingawish, Cecelio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawilot, Anastasia Nawilot, Maria Antonio Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, Jose Antonia Sivimoat, Rosaria Aulingawish Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth, Chona Chavez, Ambrose Ortega, Cecelio Chiporosa, Francisco Loss, Jose Cecilio, Salvador Gorra, Publicate Logrede, Jose Meechao, Concenciona Meechao, Valentin Meechao, Jose Maria Muta, Jose Antonio Soto, Marcelino Quashish, Josefa Quashish, and Juan Demati, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to
148 the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of January, in the year of our Lord nineteen hundred.

[SEAL.] SOUTHARD HOFFMAN,

Clerk U. S. Circuit Court, Northern District of California.

The foregoing writ of error is hereby allowed; and the same having been directed to be taken by the Department of Justice of the United States, and the defendants in error having waived in writing all bond and consented that writ of error may operate as a supersedeas,

It is hereby ordered that no bond be required for the prosecution of said writ and that the same operate as a supersedeas.

W. H. BEATTY,

Chief Justice of the Supreme Court of the State of California.

149 (Indorsed:) Original. L. A. 490. Supreme Court, State of California. Harvey, et al., adm. etc., vs. Baker, et al. Writ of error. Filed Jan. 19, 1900. Geo. W. Root, clerk; by A. W. Johnson, deputy.

150 UNITED STATES OF AMERICA, ss.

To J. Downey Harvey, administrator of the estate of John G. Downey, deceased (substituted for John G. Downey), and the Merchants' Exchange Bank of San Francisco, a corporation, defendants in error, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Allejandro Barker, Baleriana Barker, Angela Barker, Vicente Sivimoat, Leon Moro Sivimoat, Cenon Sivimoat, Cenciona Sivimoat, Salvador Nolasquez, Adolfo Moro, Silvestra Moro, Domingo Moro, Andrea Moro, Leonardo Aulingawish, Isabel Aulingawish, Matias Chutnicat, Soledad Chutnicat, Cenciona Chutnicat, Manuella Sivimoat, Roman Pena, Juan Chante, Francisco Nauwila, Guadelupe Nauwila, Maria Ignacio Naurila, Jose Blacktooth, Josefa Blacktooth, Harvacio Chutnicat, Jose Blacktooth, Inez Blacktooth, Salvador Changagash, Tomasa Nowilot, Francisca Anderson, Pasquala Anderson, Margarita Ouleot, Isadora Pena, Jose Maria Chavez, Pasquel Peloat, Francisca Peloat, Jose Juan Oulingawish, Cecelio Toshwicanwish, Pedro Oulingawish, Dolores Sivimoat, Policarpia Rodrigez, Francisco Nawikot, Anastasia Nawilot, Maria Antonia Nawilot, Ambrosio Sawivil, Jesus Sawivil, Francisca Chutnicat, Silverio Nolasquez, Jose Antonia Sivimoat, Rosaria Aulingawish, Ramona Sivimoat, Manuela Sivimoat, Marselina Blacktooth,

151 Chona Chavez, Ambrose Ortega, Cecelio Chiporosa, Francisco Loss, Jose Cecelio, Salvador Gorra, Publicate Logrede, Jose Meechao, Concenciona Meechao, Valentin Meechao, Jose Maria Muta, Jose Antonio Soto, Marcelino Quashish, Josefa Quashish and Juan Demati, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error as to said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this the 17th day of January, in the year of our Lord nineteen hundred.

W. H. BEATTY,

Chief Justice of the Supreme Court of the State of California.

152 Receipt of a copy of the within and foregoing citation admitted this 19th day of January, A. D. 1900.

WHITE & MONROE,
Attorneys for Defendants in Error.

Receipt of a copy of the within and foregoing citation admitted this 20 day of January, A. D. 1900.

THE MERCHANTS' EXCHANGE BANK OF SAN FRANCISCO,
WM. A. M. VAN BOKKELEN, *Sec., Defendant in Error.*
J. DOWNEY HARVEY, *Administrator of the Estate of John G. Downey, deceased, Defendant in Error.*

153 In the supreme court of the State of California.

J. DOWNEY HARVEY, ADM., ETC., ET AL., respondents,
v.
ALLEJANDRO BARKER ET AL., APPELLANTS. } L. A. 490.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of transcript opinion of the court, judgment, assignment of errors, petition for writ, order allowing writ without bond, original writ, and original citation, pages 1 to , inclusive, the same constituting the papers on writ of error in the above-entitled action, as shown by the records of my office.

Witness my hand and the seal of the court this 5th day of February, A. D. 1900.

[SEAL.]

GEO. W. ROOT, *Clerk.*
By A. W. JOHNSON, *Chief Deputy.*

154 (Indorsed:) L. A. No. 490. In the supreme court, State of California. Harvey, adm., etc., et al., vs. Barker et al.

(Indorsed:) Original. L. A. 490. Supreme court, State of California. Harvey et al., adm., etc., vs. Barker et al. Citation. Filed Feb. 5, 1900. Geo. W. Root, clerk, by A. W. Johnson, deputy.

(Indorsement on cover:) File No. 17650. California supreme court. Term No. 536. Allejandro Barker, Baleriana Barker, Angela Barker, et al., plaintiffs in error, vs. J. Downey Harvey, administrator of the estate of John G. Downey, deceased, and the Merchants' Exchange Bank of San Francisco. Filed February 21st, 1900.

O

CLERK'S COPY 25515

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 524. 210.

JESUS QUEVAS, SOMETIMES CALLED JESUS CUEVO, ET AL., PLAINTIFFS IN ERROR,

vs.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE ESTATE OF JOHN G. DOWNEY, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED FEBRUARY 15, 1897.

(17,663.)

23314

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 537.

JESUS QUEVAS, SOMETIMES CALLED JESUS CUEVO, ET AL., PLAINTIFFS IN ERROR,

vs.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE ESTATE OF JOHN G. DOWNEY, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error issued November 6, 1899	a	1
Caption	2	2
Transcript from superior court	3	3
Amended complaint	3	3
Answer	6	4
Findings of fact	21	13
Conclusions of law	31	19
Judgment	32	20
Statement on appeal	34	21
Stipulation as to evidence, etc	34	21
Stipulation as to evidence, etc	36	22
United States patent	39	24
Extract from expediente	45	27
Substance of depositions, etc	49	29
Objections to evidence	50	30
Notice of intention to move for new trial	52	31
Specification of errors	53	31
Specification as to insufficiency of evidence	56	33
Agreement and certificate to statement	63	37
Order denying new trial	63	37
Notice of appeal	64	37
Stipulation as to correctness of transcript	65	38
Opinion	67	38
Judgment	68	38
Assignment of errors	69	39
Petition for writ of error	77	43
Order allowing writ of error to operate as supersedeas	78	43
Citation issued November 6, 1899	79	44
Clerk's certificate	83	45
Writ of error issued January 17, 1900	84	45
Citation issued January 17, 1900	89	47
Clerk's certificate	93	48

a UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the honorable the judges of the supreme court of the State of California, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. Downey Harvey, administrator of the estate of John G. Downey, deceased, plaintiff, and Jesus Quevas, sometimes called Jesus Cuevo, named in the complaint herein as Henry Roe Quevas; José Quevas, sometimes called José Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; José Maria Quilpe, named in the complaint as John Green; Francisca Quilpe, named in the complaint as Mary Green; Maria Quilpe; Dolores Quevas, sometimes called Dolores Cuevo; Rufina Quevas, sometimes called Rufina Cuevo; Marcia Quevas, sometimes called Marcia Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; Maria Nacho, named in complaint herein as Sarah Green; Angel Quilpe; José Dolores Palawish, sometimes called José Dolores; José Felix, sometimes called Felix Wichonla; Madelina Palawish; Matilda Quevas, sometimes called Matilda Palawish; Jacobo Palawish, sometimes called Acovo Palawish; José Juan, sometimes called José Juan Palawish; Jacobo Dominga Palawish; Maria Antonio Guachona, sometimes called Maria Antonio Wichonla; Maria Jesus Colol; Sebastian Palawish; Josefa Palawish; Josefa Guachona, sometimes called Josefa Wichonla; Maria Los Angeles Palawish; Manuel Palawish; and Pelegrino Palawish, defendants, wherein was drawn in question the construction of a clause
b of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Jesus Quevas, sometimes called Jesus Cuevo, named in complaint herein as Henry Roe Quevas; José Quevas, sometimes called José Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; José Maria Quilpe, named in complaint as John Green; Francisca Quilpe, named in complaint as Mary Green; Maria Quilpe; Dolores Quevas, sometimes called Dolores Cuevo; Rufina Quevas, sometimes called Rufina Cuevo; Marcia Quevas, sometimes called Marcia Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; Maria Nacho, named in complaint herein as Sarah Green; Angel Quilpe; José Dolores Palawish, sometimes called José Dolores; José Felix, sometimes called Felix Wichonla; Madelina Palawish; Matilda Quevas, sometimes called Matilda Palawish; Jacobo Palawish, sometimes called Acovo Palawish; José Juan, sometimes called José Juan Palawish; Jacobo Dominga Palawish; Maria Antonia Guachona, sometimes called Maria Antonio Wichonla; Maria Jesus Colol; Sebastian Palawish; Josefa Guachona, sometimes called Josefa Wichonla; Maria Los Angeles Palawish; Manuel Palawish; and Pelegrino Palawish, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under

your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States
for the Northern District of California,
By W. B. BRAIZLEY,
Deputy Clerk.

The foregoing writ of error is hereby allowed; and the same having been directed to be taken by the Department of Justice of the United States, and the defendant in error having waived in writing all bond and consented that writ of error may operate as a supersedeas,

It is hereby ordered that no bond be required for the prosecution of said writ, and that the same operate as a supersedeas.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

1 (Indorsed:) L. A., 489. In the Supreme Court of the United States. Jesus Quevas, etc., et al., plaintiffs in error, v. J. Downey Harvey, administrator, etc., defendants in error. (Original.) Writ of error and supersedeas. Filed Nov. 6, 1899. Geo. W. Root, clerk, by A. W. Johnson, deputy.

2 In the supreme court of the State of California, from the superior court of San Diego County, Torrence, judge.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE estate of John G Downey, deceased, plaintiff and respondent,
vs.
JOSE QUEVAS ET AL., DEFENDANTS AND appellants.
} L. A., No. 489.

Transcript on appeal.

WHITE & MONROE.
Attorneys for Plaintiff and Respondent.
SHIRLEY C. WARD &
FRANK D. LEWIS,
Attorneys for Defendants and Appellants.

Filed December 3rd, 1897.

T. H. WARD, *Clerk,*
By F. C. WOODBURY, *Deputy.*

3 In the superior court of the county of San Diego, State of California.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE ESTATE of John G. Downey, deceased, plaintiff,

vs.

JOSÉ QUEVAS, RUFINA QUEVAS, MARCIA QUEVAS, Antonia Quevas, John Doe Quevas, Jane Doe Quevas, Henry Roe Quevas, James Doe Quevas, Mary Doe Quevas, Jacobo Juan, José Juan, Jacobo, Jacobo Doe, John Doe Feliz, James Doe Feliz, Feliz Doe, Feliz Roe, John Doe Dolores, Dolores Doe, Dolores, Feliz, Feliz, Patricio Doe, John Doe Patricio, Patricio, John Doe Sanone, Sanone, Sanone Doe, Sanone Roe, Sanone, Suturnino Chapo, Rosa Chapo, Cenon Chapo, José La Luz, Patricio Qusjo, Benea Chapo, Rufina Cuevo, Antonia Cuevo, José Cuevo, Dolores Cuevo, Angel Quilpe, Maria Quilpe, Feliz Wichonla, Maria Antonia Wichonla, Jusefa Wichonla, Domingo Palawish, Madalena Palawish, Acovo Palawish, Maria Los Angeles Palawish, Matilda Palawish, José Dolores Palawish, Manuel Palawish, José Juan Palawish, Sebastian Palawish, Maria Jesus Colol, Palegrino Palawish, John Green, James Green, Mary Green, Sarah Green, John Black, and James Black, defendants.

Amended complaint.

Now comes the plaintiff, and for cause of action against the defendants alleges:

4 I.

That all the defendants above named are Indians and half-breed Indians, and that the defendants, José Quevas, Rufina Quevas, Marcia Quevas, Antonia Quevas, Jacobo Juan, José Juan, Jacobo, Feliz, Feliz, Dolores, Sanone, Patricio, Sanone, Saturnino Chapo, Rosa Chapo, Cenon Chapo, José La Luz, Patricio Qusjo, Benea Chapo, Rufina Cuevo, Antonia Cuevo, José Cuevo, Dolores Cuevo, Angel Quilpe, Maria Quilpe, Feliz Wichonla, Maria Antonia Wichonla, Jusefa Wichonla, Dominga Palawish, Madalena Palawish, Acovo Palawish, Maria Los Angeles Palawish, Matilda Palawish, José Dolores Palawish, Manual Palawish, José Juan Palawish, Sebastian Palawish, Maria Jesus Colol, Palegrino Palawish, are respectively known by the names in this paragraph hereinbefore stated; that the true names of all the other defendants herein are unknown to plaintiff, and they are therefore designated by fictitious names in the caption hereof; and plaintiff prays that when their true names are discovered that the same may be herein inserted instead of said fictitious names.

II.

That the above-named plaintiff is the owner in fee simple of all that tract of land situate in the county of San Diego, State of California, and

more particularly described as follows, to wit: The rancho Valle de San José, being lot number 40, township 11 south, range 2 east; lot number 40, township 11 south, range 3 east; and lot number 37, township 11 south, range 4 east; all of the San Bernardino base and meridian, and being the same land described in the patent of the United States to Silvestre de la Portilla, dated January 10, 1880, and recorded in the office of the county recorder of San Diego County on February 20, 1880, in book 2 of patents at page 84 and following; said lands including 17,624.6 acres more or less.

5

III.

The above-named defendants are in the possession of portions of said tracts of land, and that they and each of them claim an interest or estate therein adverse to the plaintiff; but the plaintiff avers that the claims of said defendants and each of them are without any right whatever, and that the defendants have not, nor has either of them, any estate, right, title, or interest whatever in or to said land or premises or any part thereof.

IV.

That the plaintiff in this action asserts and claims and has ownership in fee simple as aforesaid to the lands and premises described herein, under and by virtue of a patent issued to his predecessors in interest on January 10, 1880, by the United States of America, which said patent was so issued pursuant to the provisions of an act of the Congress of the United States, approved March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and was founded upon a grant of the Mexican Government. The plaintiff's said claim and right to said land are protected and asserted under the laws of the United States and the stipulations and obligations of the treaty of Guadalupe Hidalgo entered into by the Government of the United States and the Government of Mexico.

V.

That on the 1st day of March, 1894, at the city of Los Angeles, county of Los Angeles, State of California, the said John G. Downey died intestate; that on the 17th day of March, 1894, letters of administration upon the estate of said John G. Downey were issued by the superior court of the county of Los Angeles in this State, to the plaintiff; that said plaintiff thereupon duly qualified as such administrator and entered upon the discharge of the duties of his said office, and that said letters of administration have not been revoked.

6

Wherefore plaintiff prays:

First. That said defendants and each of them may be required to set forth the nature of their respective claims to said lands, and that all adverse claims of said defendants thereto may be determined by a decree of this court.

Second. That by said decree it be declared and adjudged that the plaintiff is the owner in fee of said lands and premises, and every part thereof, and that his title thereto is good and valid, and that the defendants have

not, nor has either of them, any estate or interest therein, and that they and each of them be forever enjoined and debarred from asserting any claim whatever in or to said premises, or any part thereof, adverse to the plaintiff.

Third. That the plaintiff may have a writ for the possession of said premises as against the said defendants and each of them, and for such other and further relief as to this honorable court may seem meet and agreeable to equity, and for costs.

WHITE & MONROE,
Attorneys for Plaintiff.

Duly verified.

(Endorsed:) Filed September 11th, 1894.

[Title of court and cause.]

Answer.

Come now Jesus Quevas, sometimes called Jesus Cuevo, and named in complaint herein as Henry Roe Quevas; José Quevas, sometimes called José Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; José Maria Quilpe, named in complaint as John Green; Francisca Quilpe, named in complaint as Mary Green; Maria Quilpe; Dolores Quevas, sometimes called Dolores Cuevo; Rufina Quevas, sometimes called Rufina Cuevo; Marcia Quevas, sometimes called Marcia Cuevo; Antonia
7 Quevas, sometimes called Antonia Cuevo; Maria Nacho, named in complaint herein as Sarah Green; and Angel Quilpe, sued and served with summons herein, either by their true names or by fictitious names, and for themselves and not for their codefendants, and for answer to the complaint of plaintiff filed herein, state:

I.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that plaintiff is the owner in fee simple of all that tract of land described in Paragraph II of the complaint, and upon that ground they deny that plaintiff is the owner in fee simple, or at all, of the lands and premises described in Paragraph II of the complaint or of any part thereof.

II.

They admit that these defendants are in possession of portions of said tract of land described in Paragraph II of said complaint, and admit that each of them claims an interest and estate therein adverse to plaintiff; but they deny that their claim, or that the claim of any of them, is without right, and deny that they or any of them have no estate, right, title, or interest whatever in or to said lands or premises or any part thereof.

III.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that

plaintiff asserts and claims and has ownership in fee simple to the lands and premises described in Paragraph II of plaintiff's complaint, under and by virtue of a patent issued to his predecessors in interest by the United States of America, or that plaintiff's said claim and right to said land are protected and asserted under the laws of the United States
8 and the stipulations and obligations of the treaty of Guadalupe Hidalgo, and upon that ground they deny that plaintiff has ownership in fee simple to said lands and premises or to any part thereof, under or by virtue of a patent issued to his predecessors in interest on January 10th, 1880, by the United States of America, or at all, and deny that said patent was issued in pursuance to the provisions of an act of Congress of the United States, approved March 3rd, 1851, or at all, and deny that said patent was founded upon the grant of the Mexican Government, and deny that plaintiff's said claim and right to said land are protected and asserted under the laws of the United States and the stipulations and obligations of the treaty of Guadalupe Hidalgo.

IV.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that John G. Downey died intestate, and that letters of administration upon the estate of said John G. Downey were issued by the superior court of the county of Los Angeles, in this State, to the plaintiff, and upon that ground they deny that plaintiff is the duly qualified administrator of the estate of John G. Downey, deceased.

As a further and separate answer these defendants allege that they and their ancestors are now and were, at the time of the acquisition by the United States from Mexico of the territory embraced within the State of California, and for many years prior thereto, Mission or Pueblo Indians, known and recognized as such under the laws of Spain, Mexico, and the United States; that at the time of the acquisition from the Mexican Government by the United States of the territory embraced within
9 the present State of California, and for more than thirty years prior thereto, these defendants and their ancestors were in the actual, peaceable, open, notorious, exclusive, and adverse possession, occupancy, and use of the following-described land, to wit:

Beginning at the corner No. 23 of the accepted survey of the Rancho Valle de San José, a willow tree ten inches in diameter, marked P XXIII, in the ravine, from which a sycamore tree five inches in diameter bears south 39½°, east 60 links distant for corner No. 1; thence running north 50¾°, east (variation 13½° east), 19 and 85-100 chains to corner No. 2; thence north 34¾°, west 47 chains to corner No. 3; thence south 46°, west 32 and 40-100 chains to corner No. 4; thence south 50¾°, east 45 chains to point of beginning, containing in all 118 and 69-100 acres, being a portion of the lands and premises described in Par. II of plaintiff's complaint herein.

That at all times herinabove mentioned prior to the acquisition by the United States from Mexico of the territory embraced within the State of California, these defendants and their ancestors occupied and held such possession of said lands under and by virtue of laws and regulations of

the Mexican Government and under claim of right so to do, and were entitled by said laws and regulations to so use, occupy, and possess the same against all other parties whatsoever.

That the rights of these defendants and their ancestors to so occupy, use, and possess said lands were established and guaranteed by virtue of the laws and regulations of the Mexican Government in effect at all times herein mentioned prior to the acquisition by the United States from Mexico of the territory now embraced within the State of California.

That these defendants, together with their ancestors, at all times
10 since the acquisition by the United States from Mexico of the territory now embraced within the State of California have been and remain in the continuous, open, notorious, actual, peaceable, exclusive, and adverse possession, occupancy, and use of all said lands as against all the world and have acquired and now hold all the right, title, and interest so held and possessed by themselves and their ancestors, as aforesaid, prior to the acquisition by the United States from Mexico of such territory.

That in and by virtue of the treaty known as the "Treaty of Guadalupe Hidalgo," between the United States and the Mexican Republic, and by virtue of the general law of nations, the United States recognized and stipulated to protect the rights and title of these defendants to the use, occupancy, and possession of said lands in the same manner as they and their ancestors had, under and by virtue of the Mexican laws and regulations, been entitled to possess and occupy the same.

That these defendants are now in equity the owners and against all the world are entitled to the possession, occupancy, and use of the said lands.

VI.

That at the date of the grant or pretended grant by the Mexican Government, under which plaintiff claims title to said lands and premises, they were occupied, possessed, and claimed by these defendants, their ancestors and predecessors, and that said lands were not vacant and unoccupied lands at such time, subject to private grant under the laws of Mexico.

That the said grant or pretended grant was made subject to and in subordination to the rights of these defendants, their ancestors and predecessors, as aforesaid, to use, occupy, and possess said lands, and not otherwise.

11

VII.

That by the confirmation of the grant under which plaintiff claims and the issuing of the patent therefor, the Government of the United States did not purport to give or to grant and has not given or granted any other or different title from that granted by the Mexican Government, to wit, a grant subject to and in subordination to the rights of these defendants, their ancestors and predecessors, to the lands and premises aforesaid, as hereinbefore stated, but that nevertheless said patent on its face purports to convey said lands and premises absolutely and without regard to the rights and claims of the defendants and without being subject or subordinate to their said rights or claims, as hereinbefore stated.

The said patent is a cloud upon the title of these defendants, as aforesaid, to said land and premises.

Wherefore, these defendants pray that the plaintiff take nothing by this action, and that these defendants have judgment that their right to the occupancy, use, and possession of said land and premises be decreed to be prior and paramount to the said title of the plaintiff, and that said patent be decreed to be subject and subordinate to their right to use, occupy, and possess said lands exclusively for their own use and benefit; and that they have such other and further relief as may be meet and proper, together with their costs in this behalf expended.

Come now José Dolores Palawish, sometimes called José Dolores, José Feliz, sometimes called Feliz Wichonla, Madelina Palawish, Matilda Quevas, sometimes called Matilda Palawish, Jacobo Palawish, sometimes called Acovo Palawish, José Juan, sometimes called José Juan Palawish, Jacobo Dominga Palawish, Maria Antonia Guachona, sometimes called Maria Antonio Wichonla, Maria Jesus Colol, Sebastian Palawish,
12 Josefa Guachona, sometimes called Josefa Wichonla, Maria Los Angeles Palawish, Manuel Palawish, and Pelegrino Palawish, sued and served with summons herein, either by their true names or by fictitious names, and for themselves and not for their codefendants, and for answer to the complaint of plaintiff filed herein, state:

I.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegations of the complaint that plaintiff is the owner in fee simple of all that tract of land described in paragraph II of the complaint, and upon that ground they deny that plaintiff is the owner in fee simple, or at all, of the lands and premises described in paragraph II of the complaint, or of any part thereof.

II.

They admit that these defendants are in possession of portions of said tract of land described in paragraph II of said complaint, and admit that each of them claims an interest and estate therein adverse to plaintiff, but they deny that their claim, or that the claim of any of them, is without right, and deny that they or any of them have no estate, right, title, or interest whatever, in or to said lands or premises or any part thereof.

III.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that plaintiff asserts and claims and has ownership in fee simple to the lands and premises described in paragraph II of plaintiff's complaint, under and by virtue of a patent issued to his predecessors in interest by the United States of America, or that plaintiff's said claim and right to said land are protected and asserted under the laws of the United
13 States and the stipulations and obligations of the treaty of Guadalupe Hidalgo, and upon that ground they deny that plaintiff has

ownership in fee simple to said lands and premises, under or by virtue of a patent issued to his predecessors in interest on January 10th, 1880, by the United States of America, or at all, and deny that said patent was issued in pursuance to the provisions of an act of Congress of the United States, approved March 3rd, 1851, or at all, and deny that said patent was founded upon the grant of the Mexican Government, and that plaintiff's said claim and right to said land are protected and asserted under the laws of the United States and the stipulations and obligations of the treaty of Guadalupe Hidalgo.

IV.

That they have no knowledge, information, or belief, upon the subject sufficient to enable them to answer the allegation of the complaint that John G. Downey died intestate, and that letters of administration upon the estate of said John G. Downey were issued by the superior court of the county of Los Angeles, in this state, to the plaintiff, and upon that ground they deny that plaintiff is the duly qualified administrator of the estate of John G. Downey, deceased.

V.

As a further and separate answer, these defendants allege that they and their ancestors are now and were, at the time of the acquisition by the United States from Mexico of the territory embraced within the State of California, and for many years prior thereto, Mission, or Pueblo Indians, known and recognized as such under the laws of Spain, Mexico, and the United States; that at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the present State of California, and for more than thirty
14 years prior thereto, these defendants and their ancestors were in the actual, peaceable, open, notorious, exclusive, and adverse possession, occupancy, and use of the following described land, to wit:

Beginning at corner No. 5 of the accepted survey of Valle de San José, an oak tree 23 inches in diameter, from which a black-oak tree 17 inches in diameter bears north 75½° east 75 links distant for corner No. 1; thence south 52¼° east (variation 13½° east) 46 and 75-100 chains to corner No. 2; thence north 43° east 15 and 15-100 chains to corner No. 3; thence north 52¼° west 46 and 75-100 chains to corner No. 4; thence south 43° west 15 and 15-100 chains to the point of beginning, containing in all 70 and 54-100 acres, being a portion of the lands and premises described in paragraph II of plaintiff's complaint herein.

That at all times hereinabove mentioned prior to the acquisition by the United States from Mexico of the territory embraced within the State of California, these defendants and their ancestors occupied and held such possession of said lands under and by virtue of the laws and regulations of the Mexican Government, and under claim of right so to do; and were entitled by said laws and regulations to so use, occupy and possess the same against all other parties whatsoever;

That the rights of these defendants and their ancestors to so occupy, use, and possess said lands were established and guaranteed by virtue

of the laws and regulations of the Mexican Government in effect at all times herein mentioned prior to the acquisition by the United States from Mexico of the territory now embraced within the State of California;

That these defendants, together with their ancestors, at all times since the acquisition by the United States from Mexico of the territory
15 now embraced within the State of California, have been and remain in the continuous, open, notorious, actual, peaceable, exclusive, and adverse possession, occupancy, and use of all said lands as against all the world, and have acquired, and now hold, all the right, title, and interest, so held and possessed by themselves and their ancestors, as aforesaid, prior to the acquisition by the United States from Mexico of such territory;

That in and by virtue of the treaty known as the "treaty of Guadalupe Hidalgo," between the United States and the Mexican Republic, and by virtue of the general law of nations, the United States recognized and stipulated to protect the rights and title of these defendants to the use, occupancy, and possession of said lands in the same manner as they and their ancestors had, under and by virtue of the Mexican laws and regulations, been entitled to possess and occupy the same.

That these defendants are now in equity the owners and against all the world are entitled to the possession, occupancy, and use of the said lands.

VI.

That at the date of the grant or pretended grant by the Mexican Government, under which plaintiff claims title to said lands and premises, they were occupied, possessed, and claimed by these defendants, their ancestors and predecessors, and that said lands were not vacant and unoccupied lands at such time, subject to private grant under the laws of Mexico.

That the said grant or pretended grant was made subject to and in subordination to the rights of these defendants, their ancestors, and predecessors, as aforesaid, to use, occupy, and possess said lands, and not otherwise.

VII.

That by the confirmation of the grant under which plaintiff
16 claims and the issuing of the patent therefor, the Government of the United States did not purport to give or to grant and has not given or granted any other or different title from that granted by the Mexican Government, to wit, a grant subject to and in subordination to the rights of these defendants, their ancestors and predecessors, to the lands and premises aforesaid, as hereinbefore stated, but that nevertheless said patent on its face purports to convey said lands and premises absolutely and without regard to the rights and claims of the defendants and without being subject or subordinate to their said rights or claims, as hereinbefore stated. The said patent is a cloud upon the title of these defendants, as aforesaid, to said land and premises.

Wherefore, these defendants pray that the plaintiff take nothing by this action, and that these defendants have judgment that their right to

the occupancy, use, and possession of said land and premises be decreed to be prior and paramount to the said title of the plaintiff; and that said patent be decreed to be subject and subordinate to their right to use, occupy, and possess said lands exclusively for their own use and benefit; and that they have such other and further relief as may be meet and proper, together with their costs in this behalf expended.

Come now José La Luz, Saturnino Chapo, Julian Chapo, named in complaint herein as John Black; Concession Chapo, named in complaint herein as Jane Doe Quevas; Juan Quaja, named in complaint herein as John Doe Quevas; Patricio Quaja, named in complaint herein as Patricio Qusjo; Susana Quaja, named in complaint herein as Mary Doe Quevas; Maria Antonia Sobermuta, Sanone, Matilda Osun, named in complaint herein as Dolores Doe; Cenon Chapo, Benea Chapo, Louisa Chapo, named in complaint herein as Sanone Doe; Maria Guachona,
17 Maria Antonia Guachona, and Rosa Guachona, sometimes called Rosa Chapo, sued and served with summons herein, either by their true names or by fictitious names, and for themselves and not for their codefendants, and for answer to the complaint of plaintiff filed herein, state:

I.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegations of the complaint that plaintiff is the owner in fee simple of all that tract of land described in Paragraph II of the complaint, and upon that ground they deny that plaintiff is the owner in fee simple, or at all, of the lands and premises described in Paragraph II of the complaint, or of any part thereof.

II.

They admit that these defendants are in possession of portions of said tract of land described in Paragraph II of said complaint, and admit that each of them claims an interest and estate therein adverse to plaintiff, but they deny that their claim, or that the claim of any of them, is without right, and deny that they or any of them have no estate, right, title, or interest whatever in or to said lands or premises, or any part thereof.

III.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that plaintiff asserts and claims and has ownership in fee simple to the lands and premises described in Paragraph II of plaintiff's complaint, under and by virtue of a patent issued to his predecessors in interest by the United States of America, or that plaintiff's said claim and right to said land are protected and asserted under the laws of the United States
18 and the stipulations and obligations of the treaty of Guadalupe Hidalgo, and upon that ground they deny that plaintiff has ownership in fee simple to said lands and premises, under or by virtue of a patent issued to his predecessors in interest on January 10th, 1880, by

the United States of America, or at all, and deny that said patent was issued in pursuance to the provisions of an act of Congress of the United States, approved March 3rd, 1851, or at all, and deny that said patent was founded upon the grant of the Mexican Government, and deny that plaintiff's said claim and right to said land are protected and asserted under the laws of the United States and the stipulations and obligations of the treaty of Guadalupe Hidalgo.

IV.

That they have no knowledge, information, or belief upon the subject sufficient to enable them to answer the allegation of the complaint that John G. Downey died intestate, and that letters of administration upon the estate of said John G. Downey were issued by the superior court of the county of Los Angeles, in this State, to the plaintiff, and upon that ground they deny that plaintiff is the duly qualified administrator of the estate of John G. Downey, deceased.

V.

As a further and separate answer, these defendants allege that they and their ancestors are now and were at the time of the acquisition by the United States from Mexico of the territory embraced within the State of California, and for many years prior thereto, Mission or Pueblo Indians, known and recognized as such under the laws of Spain, Mexico, and the United States. That at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the present State of California, and for more than thirty
19 years prior thereto, these defendants and their ancestors were in the actual, peaceable, open, notorious, exclusive, and adverse possession, occupancy, and use of the following-described land, to wit:

Beginning at corner No. 3 of the accepted survey of the Rancho Valle de San José, it being a willow tree 50 inches in diameter, marked P III; thence running south, 55½° east (variation 13¼° east), 39 and 39-100 chains; thence north, 8½° east, 9 and 85-100 chains; thence north, 42½° west, 19 and 50-100 chains; thence north, 77° west, 15 and 71-100 chains; thence south, 46° west, 7 and 24-100 chains to point of beginning, containing in all 37 and 89-100 acres, being a portion of the lands and premises described in paragraph II of plaintiff's complaint herein.

That at all times hereinabove mentioned, prior to the acquisition by the United States from Mexico of the territory embraced within the State of California, these defendants and their ancestors occupied and held such possession of said lands under and by virtue of the laws and regulations of the Mexican Government and under claim of right so to do, and were entitled by said laws and regulations to so use, occupy, and possess the same against all other parties whatsoever.

That the rights of these defendants and their ancestors to so occupy, use, and possess said lands were established and guaranteed by virtue of the laws and regulations of the Mexican Government in effect at all times herein mentioned prior to the acquisition by the United States from Mexico of the territory now embraced within the State of California.

That these defendants, together with their ancestors, at all times since the acquisition by the United States from Mexico of the territory now embraced within the State of California, have been and remain in the continuous, open, notorious, actual, peaceable, exclusive, and
20 adverse possession, occupancy, and use of all said lands as against all the world, and have acquired and now hold all the right, title, and interest so held and possessed by themselves and their ancestors, as aforesaid, prior to the acquisition by the United States from Mexico of such territory.

That in and by virtue of the treaty known as the "Treaty of Guadalupe Hidalgo" between the United States and the Mexican Republic, and by virtue of the general law of nations, the United States recognized and stipulated to protect the rights and title of these defendants to the use, occupancy, and possession of said lands in the same manner as they and their ancestors had under and by virtue of the Mexican laws and regulations been entitled to possess and occupy the same.

That these defendants are now in equity the owners, and against all the world are entitled to the possession, occupancy, and use of the said lands.

VI.

That at the date of the grant or pretended grant by the Mexican Government, under which plaintiff claims title to said lands and premises, they were occupied, possessed, and claimed by these defendants, their ancestors and predecessors, and that said lands were not vacant and unoccupied lands at such time subject to private grant under the laws of Mexico.

That the said grant or pretended grant was made subject to and in subordination to the rights of these defendants, their ancestors and predecessors, as aforesaid, to use, occupy, and possess said lands, and not otherwise.

VII.

That by the confirmation of the grant under which plaintiff claims, and the issuing of the patent therefor, the Government of the United States did not purport to give or to grant and has not given or
21 granted any other or different title from that granted by the Mexican Government, to wit, a grant subject to and in subordination to the rights of these defendants, their ancestors and predecessors, to the lands and premises aforesaid, as hereinbefore stated, but that nevertheless said patent on its face purports to convey said lands and premises absolutely and without regard to the rights and claims of the defendants and without being subject or subordinate to their said rights or claims, as hereinbefore stated. The said patent is a cloud upon the title of these defendants, as aforesaid, to said land and premises.

Wherefore, these defendants pray that the plaintiff take nothing by this action, and that these defendants have judgment that their right to the occupancy, use, and possession of said land and premises be decreed to be prior and paramount to the said title of the plaintiff, and that said patent be decreed to be subject and subordinate to their right to use, occupy, and possess said lands exclusively for their own use and benefit.

and that they have such other and further relief as may be meet and proper, together with their costs in this behalf expended.

SHIRLEY C. WARD &
FRANK D. LEWIS,
Spe. U. S. Atty. for Mission Indians,
Attorneys for Defendants Herein Appearing.

Duly verified.
(Endorsed:) Filed Oct. 1st, 1895.

[Title of court and cause.]

Findings.

This cause having been called regularly for trial before the court on the 14th day of November, 1896, and a jury trial having then been expressly and duly waived by the respective parties, Messrs.
22 White & Monroe appearing as attorneys for plaintiff, and Shirley C. Ward and Frank D. Lewis, esqs., appearing as attorneys for defendants, Jesus Quevas, sometimes called Jesus Cuevo, and named in the complaint herein as Henry Roe Quevas, José Quevas, sometimes called José Cuevo, Antonio Quevas, sometimes called Antonio Cuevo, José Maria Quilpe, named in complaint as John Green, Francisca Quilpe, named in complaint as Mary Green, Maria Quilpe, Dolores Quevas, sometimes called Dolores Cuevo, Rufina Quevas, sometimes called Rufina Cuevo, Marcia Quevas, sometimes called Marcia Cuevo, Antonio Quevas, sometimes called Antonio Cuevo, Maria Nacho, named in complaint herein as Sarah Green, Angel Quilpe, José Dolores Palawish, sometimes called José Dolores, José Feliz, sometimes called Feliz Wichonla, Madalena Palawish, Matilda Quevas, sometimes called Matilda Palawish, Jacobo Palawish, sometimes called Acovo Palawish, José Juan, sometimes called José Juan Palawish, Jacobo Dominga Palawish, Maria Antonia Guachona, sometimes called Maria Antonia Wichonla, Maria Jesus Colol, Sebastian Palawish, Josefa Palawish, sometimes called Josefa Guachona, and sometimes called Josefa Wichonla, Maria Los Angeles Palawish, Manuel Palawish, Pelegrino Palawish, José La Luz, Saturnino Chapo, Julian Chapo, named in complaint herein as John Black, Concession Chapo, named in complaint herein as Jane Doe Quevas, Juan Quaja, named in complaint herein as John Doe Quevas, Patricio Quaja, named in complaint herein as Patricio Qusjo, Susana Quaja, named in complaint herein as Mary Doe Quevas, Maria Antonia Sobermuta, named in complaint herein as Dolores Sanone, Matilda Osun, named in complaint herein as Dolores Doe, Cenon Chapo, Benca Chapo, Louisa Chapo, named in complaint herein as Sanone Doe, Maria Guachona, named in complaint herein as Sanone Roe, Maria Antonia
23 Guachona, named in complaint herein as Feliz, and Rosa Guachona, sometimes called Rosa Chapo, and also known as Rosa La Powat; and thereupon plaintiff dismissed this action as to all the defendants other than those last above named, and the court having heard the proofs of the respective parties, and considered the same, and the records and papers in the case, and the arguments of the respective attorneys therein, and the cause having been submitted to the court for

its decision, and by the court taken under advisement, the court now finds the following facts:

I.

That all of the said defendants last above named are Indians and half-breed Indians.

II.

That the plaintiff is the owner in fee simple of all of that tract of land situated in the county of San Diego, State of California, and more particularly described as follows, to wit:

The rancho Valle de San José, being lot number 40, township 11 south, range 2 east; lot number 40, township 11 south, range 3 east; and lot number 37, township 11 south, range 4 east; all of the San Bernardino base and meridian, and being the same land described in the patent of the United States to Silvestre de la Portilla, dated January 10, 1880, and recorded in the office of the county recorder of San Diego County, on February 20, 1880, in book 2 of patents at page 84 and following; said lands including 17,624.6 acres more or less.

III.

That the defendants last above named are in possession of portions of said tracts of land, and they, and each of them, claim an interest or estate therein adverse to the plaintiff, but that the claims of the defendants, and each of them, are without right, title or interest whatever in or to said land or premises, or any part thereof.

24

IV.

That the plaintiff has ownership in fee simple to the lands and premises described herein under and by virtue of said patent issued to his predecessor in interest, Silvestre de la Portilla, on January 10, 1880, by the United States of America, which said patent was so issued pursuant to the provisions of an act of the Congress of the United States, approved March 3, 1851, entitled: "An act to ascertain and settle the private land claims in the State of California," and was founded upon a grant of the Mexican Government; and the plaintiff's said ownership is protected and asserted under the laws of the United States, and the stipulations and obligations of the treaty of Guadalupe Hidalgo, entered into by the Government of the United States and the Government of Mexico; and the plaintiff has succeeded by mesne conveyances to the interest of the patentee in said patent.

V.

That on the 1st day of March, 1894, at the city of Los Angeles, State of California, said John G. Downey died; and that on the 17th day of March, 1894, letters of administration upon the estate of John G. Downey were issued by the superior court of the County of Los Angeles, in this State, to the plaintiff, and that said plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of his said

office, and so continued until the 26th day of July, 1895, when a will of said John G. Downey having been discovered, the said plaintiff was, by said superior court of Los Angeles County, State of California, duly appointed administrator with the will annexed of the estate of John G. Downey, deceased, and that he thereupon duly qualified as such administrator with the will annexed, and entered upon the discharge of his said office, and that said letters of administration with the will annexed have not been revoked.

VI.

25 That said John G. Downey in his lifetime and up to the time of his death was the owner in fee simple of all the lands herein described, and that during his lifetime he paid all the taxes of every kind that were levied or assessed upon any or all of said lands from the issuing of the patent until his death, and that since his death all taxes of every kind that have been levied or assessed upon said lands have been paid by the plaintiff herein, and that the defendants have not, nor has either of them, paid any taxes on said lands or any part thereof.

VII.

That the following defendants, to wit, Jesus Quevas, sometimes called Jesus Cuevo and named in complaint herein as Henry Roe Quevas, José Quevas, sometimes called José Cuevo, Antonio Quevas, sometimes called Antonio Cuevo, José Maria Quilpe, named in complaint as John Green, Francisca Quilpe, named in complaint as Mary Green, Maria Quilpe, Dolores Quevas, sometimes called Dolores Cuevo, Rufina Quevas, sometimes called Rufina Cuevo, Marcia Quevas, sometimes called Marcia Cuevo, Antonia Quevas, sometimes called Antonia Cuevo, Maria Nacho, named in complaint herein as Sarah Green and Angel Quilpe were not, nor was either of them, nor were the ancestors or ancestor of either of them at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto, or at all, recognized as Mission or Pueblo Indians under the laws of Spain, Mexico, and the United States, and were not in the adverse possession, occupancy, or use of the following described land, to wit:

Beginning at the corner No. 23 of the accepted survey of the rancho Valle de San José, a willow tree ten inches in diameter, 26 marked P XXIII in the ravine, from which a sycamore tree five inches in diameter bears south 39½° east 60 links distant for corner No. 1; thence running north 50¾° east (variation 13½° east) 19.85 chains to corner No. 2; thence north 34¾° west 47 chains to corner No. 3; thence south 46° west 32.40 chains to corner No. 4; thence south 50¾° east 45 chains to point of beginning, containing in all 118.69 acres, being a portion of the lands and premises described in par. II of plaintiff's complaint herein, and first herein described, or of any portion of said land, and first herein described, and have never since that time been in the adverse possession, occupancy, or use of any or all of said land as against all the world, and have never acquired and do not now hold or

have any right, title, or interest in said lands, or any part thereof; that they are not, nor is either of them, in equity or otherwise, the owner or owners, or entitled to the possession, occupancy, or use of said lands or any of them, but that the plaintiff is entitled to the immediate possession of all of said lands.

VIII.

That the grant by the Mexican Government to the predecessors of the plaintiff of the lands herein described was not made subject to, or in subordination to the rights of said defendants, their ancestors or predecessors, or any of them, and no claim of any of said defendants, their ancestors or predecessors, to any of said land was ever presented to the board of land commissioners of the State of California, as required by act of Congress.

IX.

That the following defendants, to wit, José Dolores Palawish, sometimes called José Dolores, José Feliz, sometimes called Feliz Wichonla, Madalena Palawish, Matilda Quevas, sometimes called Matilda Palawish, Jacobo Palawish, sometimes called Acovo Palawish, José
27 Juan, sometimes called José Juan Palawish, Jacobo Dominga Palawish, Maria Antonia Guachona, sometimes called Maria Antonia Wichonla, Maria Jesus Colol, Sebastian Palawish, Josefa Palawish, sometimes called Josefa Guachona and sometimes called Josefa Wichonla, Maria Los Angeles Palawish, Manuel Palawish, and Pelegrino Palawish were not, nor was either of them, at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto, or at all, recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and the United States, and were not in the adverse possession, occupancy, or use of the following-described land, to wit:

Beginning at corner No. 5 of the accepted survey of Valle de San José, an oak tree 23 inches in diameter from which a black-oak tree 17 inches in diameter bears north 75½° east 75 links distant for corner No. 1; thence south 52¼° east (variation 13½° east) 46 and 75-100 chains to corner No. 2; thence north 43° east 15 and 15-100 chains to corner No. 3; thence north 52¼° west 46 and 75-100 chains to corner No. 4; thence south 43° west 15 and 15-100 chains to the point of beginning, containing in all 70 and 54-100 acres, being a portion of the lands and premises described in paragraph II of plaintiff's complaint herein, and first herein described, or of any portion of said land, and have never since that time been in the adverse possession, occupancy, or use of any or all of said land as against all the world, and have never acquired, and do not now hold, or have any right, title, or interest in said lands, or any part thereof; that they are not, nor is either of them, in equity or otherwise, the owner or owners, or entitled to the possession, occupancy, or
28 use of said lands or any of them, but that the plaintiff is entitled to the immediate possession of all of said lands.

X.

That the grant by the Mexican Government to the predecessors of the plaintiff of the lands herein described was not made subject to or in subordination to the rights of said defendants, their ancestors or predecessors, or any of them, and no claim of any of said defendants, their ancestors or predecessors, to any of said lands was ever presented to the board of land commissioners of the State of California, as required by act of Congress.

XI.

That the following-named defendants, to wit, José La Luz, Saturnino Chapo, Julian Chapo, named in complaint herein as John Black, Concession Chapo, named in complaint herein as Jane Doe Quevas, Juan Quaja, named in complaint herein as John Doe Quevas, Patricio Quaja, named in complaint herein as Patricio Qusjo, Susana Quaja, named in complaint herein as Mary Doe Quevas, Maria Antonia Sobermuta, named in complaint herein as Dolores, Sanone, Matilda Osun, named in complaint herein as Dolores Doe, Cenon Chapo, Benea Chapo, Louisa Chapo, named in complaint herein as *as* Sanone Doe, Maria Guachona, named in complaint herein as Sanone Roe, Maria Antonia Guachona, named in complaint herein as Feliz, and Rosa Guachona, sometimes called Rosa Chapo and also known as Rosa La Powat, were not nor was either of them, nor were the ancestors or ancestor of either of them, at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto, or at all, recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and the United States, and
29 were not in the adverse possession, occupancy, or use of the following described land, to wit:

Beginning at corner No. 3 of the accepted survey of the Rancho Valle de San José, it being a willow tree 50 inches in diameter, marked P III; thence running south 55½° east (variation 13¼° east) 39 and 39-100 chains; thence north 8½° east 9 and 85-100 chains; thence north 42½° west 19 and 50-100 chains; thence north 77° west 15 and 71-100 chains; thence south 46° west 7 and 24-100 chains to point of beginning, containing in all 37 and 89-100 acres, being a portion of the lands and premises described in paragraph II of plaintiff's complaint herein, and first herein described, or of any portion of said land; and have never since that time been in the adverse possession, occupancy, or use of any or all of said land as against all the world, and have never acquired and do not now hold, or have any right, title, or interest in said lands, or any part thereof; that they are not, nor is either of them, in equity or otherwise, the owner or owners or entitled to the possession, occupancy, or use of said lands, or any of them, but that the plaintiff is entitled to the immediate possession of all of said lands.

XII.

That the grant by the Mexican Government to the predecessors of the plaintiff of the lands herein described was not made subject to or in subordination to the rights of said defendants, their ancestors or prede-

cessors, or any of them, and no claim of any of said defendants, their ancestors or predecessors to any of said lands was ever presented to the board of land commissioners of the State of California as required by act of Congress.

XIII.

That none of the defendants or their ancestors, at any time prior to the acquisition by the United States from Mexico of the territory
30 embraced within the State of California, occupied or held any possession of any of the lands described in the complaint or herein described under or by virtue of the laws or regulationsof the Government of Mexico, or under claim of right so to do, and were not entitled by said laws and regulations to so use, occupy, or possess the same against all or any parties whatsoever, and that no right to occupy, use, or possess said lands or any of them by any of said defendants, or their ancestors, was established or guaranteed by the laws or regulations of the Mexican Government at any time.

That the United States did not by the treaty of Guadalupe Hidalgo, or by the general law of nations recognize or stipulate to protect any right or title of the defendants or any of them, to the use, occupancy of possession of any of said lands in any manner whatever.

Plaintiff has title to all of said lands by virtue of the patent herein referred to, and at the date of the grant mentioned in said patent all of said lands were subject to private grant under the laws of Mexico.

By the issuing of said patent and the confirmation of the grant therein mentioned the Government of the United States purported and intended to convey said lands and premises, absolutely without regard to the rights or claims of any of said defendants and without being subject or subordinate to any rights or claims of any of said defendants to any of said lands, and none of said defendants have or ever had any valid claim or right to any of said lands.

Said patent is not a cloud upon any title of any of said defendants.

31 *Conclusions of law.*

As conclusions of law from the foregoing facts the court now hereby finds and decides:

I.

That the plaintiff is the owner in fee simple and entitled to the possession of all the lots, tracts, and parcels of land as the same are described in the complaint on file herein as against the defendants all and severally, and all persons claiming or to claim the same, or any part of said lands under them, the said defendants, or either of them, and that neither one of said defendants has any right, title, or interest in or to said lands or any part thereof.

II.

That the plaintiff is entitled to a decree as prayed for in his complaint to quiet his title to said lands against said defendants and each of them, and all persons claiming or to claim the same or any part thereof under or through said defendants or either of them.

III.

That the plaintiff is entitled to judgment for costs, to be taxed herein against such defendants as answered herein contesting plaintiff's right in said premises.

And judgment is hereby ordered to be entered accordingly.

San Diego, Cal., December 29th, 1896.

W. L. PIERCE,
Superior Judge.

(Endorsed:) Filed Dec. 29, 1896.

32 [Title of court and cause.]

Judgment.

This cause having been regularly called and tried by the court, and the findings of fact and conclusions of law having been duly rendered by the court, which are now on file in this cause, wherein judgment was awarded in favor of J. Downey Harvey, administrator with the will annexed of the estate of John G. Downey, deceased, plaintiff, against all of the defendants, and for costs, on motion of Messrs. White & Monroe, plaintiff's attorneys.

It is now, therefore, ordered, adjudged, and decreed that the plaintiff have judgment as prayed for in his complaint herein against the defendants Jesus Quevas, sometimes called Jesus Cuevo, and named in the complaint herein as Henry Roe Quevas; José Quevas, sometimes called José Cuevo; Antonio Cuevas, sometimes called Antonio Cuevo; José Maria Quilpe, named in the complaint as John Green; Francisca Quilpe, named in complaint as Mary Green; Maria Quilpe; Dolores Quevas, sometimes called Dolores Cuevo; Rufina Quevas, sometimes called Rufina Cuevo; Marcia Quevas, sometimes called Marcia Quevo; Antonia Quevas, sometimes called Antonia Cuevo; Maria Nacho, named in complaint herein as Sarah Green; Angel Quilpe; José Dolores Palawish, sometimes called José Dolores; José Feliz, sometimes called Feliz Wichonla; Madalena Palawish; Matilda Quevas, sometimes called Matilda Palawish; Jacobo Palawish, sometimes called Acovo Palawish; José Juan, sometimes called José Juan Palawish; Jacobo Dominga Palawish; Maria Antonia Guachona, sometimes called Maria Antonia Wichonla; Maria Jesus Colol, Sebastian Palawish; Josefa Palawish, sometimes called Josefa Guachona and sometimes called Josefa Wichonla; Maria Los Angeles Palawish, Manuel Palawish, Pelegrino Palawish,
33 José La Luz, Saturnino Chapo; Julian Chapo, named in complaint herein as John Black; Concession Chapo, named in complaint herein as Jane Doe Quevas; Juan Quaja, named in complaint herein as John Doe Quevas; Patricio Quaja, named in complaint herein as Patricio Qusjo; Susana Quaja, named in complaint herein as Mary Doe Quevas; Maria Antonia Sobermuta, named in complaint herein as Dolores Sanone; Matilda Osun, named in complaint herein as Dolores Doe; Cenon Chapo, Benea Chapo; Louisa Chapo, named in complaint herein as Sanone Doe; Maria Guachona, named in complaint herein as Sanone Roe; Maria Antonia Guachona, named in complaint herein as Feliz, and Rosa Guachona, sometimes called Rosa Chapo and also known as Rosa la Powat,

and each and all of them; that all adverse claims of defendants, and each and all of them, and all persons claiming or to claim said premises or any part thereof through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless and that the plaintiff be, and he is, hereby declared and adjudged to be the true and lawful owner of the lands described in the complaint and hereinafter described, and every part and parcel thereof, and that his title thereto is adjudged to be quieted against all claims, demands, or pretensions of defendants, or either of them, who are hereby perpetually estopped from setting up any claims thereto, or any part thereof.

Said premises are bounded and described as follows:

That tract of land situated in the county of San Diego, State of California, and more particularly described as follows, to wit:

The rancho Valle de San José, being lot number 40, township 11 south, range 2 east; lot number 40, township 11 south, range 3 east, and lot number 37, township 11 south, range 4 east, all of the San Ber-
34 nardino base and meridian, and being the same land described in the patent of the United States to Silvestre de la Portilla, dated January 10, 1880, and recorded in the office of the county recorder of San Diego County on February 20, 1880, in book 2 of patents, at page 84 and following, said lands including 17,624.6 acres, more or less.

And it is further ordered, adjudged, and decreed that the plaintiff do have and recover his costs, hereby taxed at one hundred and six and 10-100 dollars, against the defendants.

San Diego, Cal., December 29, 1896.

W. L. PIERCE, *Superior Judge.*

(Endorsed:) Filed Dec. 29, 1896. Entered in judgment book 16, page 386. Will H. Holcomb, clerk, by W. H. A., deputy.

Duly verified.

[Title of court and cause.]

Statement on appeal.

This cause was submitted to the court upon a stipulation of the parties, filed herein upon the 14th day of November, 1896, such stipulation being as follows:

[Title of court and cause.]

It is hereby stipulated that this case may be submitted upon the depositions taken herein and upon the stipulation as to testimony filed with this stipulation (being the stipulation following this), and upon the record of the United States patent, recorded in book 2, page 85, of patents, San Diego County records, and upon the plaintiff's brief, filed herewith, and upon defendant's brief, to be filed within ten days, and upon the briefs filed by both parties in the case of Harvey v. Barker et al., No. 6919, in this court.

35 It is further stipulated that there is attached to the original "expediente," copy of which is contained in the stipulation herewith filed, a sketch, which is made a part of that "expediente," and that on said sketch, at about the location of the Indian villages of Puerta Nori and San José, there are marks as follows: ∧ ∧ ∧ ∧ , and the word "Rancheria" in each case.

It is also stipulated that Francisco Ruis was a witness in the district court of the United States for the southern district of California, in the case of United States v. Portilla, in which case the grant to Portilla was confirmed; and that he testified that one of the well-known points in the "Valle San José," or Portilla grant, was a "green valley bordering on a road going towards the rancheria called Metajuai."

It is also stipulated that in that case in the district court, there was introduced in evidence the "expediente," which was followed by a translation of the same, and in that translation, in the second condition of the grant, copy of which is contained on page 17 of the stipulation herewith filed, lines 19 to 23 inclusive, the original is translated as follows: "2. He may enclose the said land without injuring the roads and servitudes. He may cultivate it freely, exclusively, etc."

All these stipulations as to facts are made subject to the objection already made to all the oral testimony in the case.

It is further stipulated that at any time within fifteen (15) days from the submission hereof, the defendants may introduce in evidence, subject to the same objection, any portion of the transcript or record in the case of United States v. Portilla, and filed in the office of the clerk of the district court of the United States for the northern district of California, and that the plaintiff, if he so desires, may introduce in evidence
36 a copy, certified by said clerk, of the grant contained on pages 17 and 18 of the stipulation filed herewith in the Spanish language.

SHIRLEY C. WARD &
FRANK D. LEWIS,
Attorneys for Defendants.
WHITE & MONROE,
Attorneys for Plaintiff.

The stipulation as to the testimony referred to in the foregoing stipulation, which was filed at the same time as such stipulation, is as follows:

[Title of court and cause.]

It is hereby stipulated that the ages of the witnesses whose depositions were taken at the Warner ranch, in San Diego County, on the 21st day of August, 1896, are as follows:

Leonardo Aulingawish, 85 years; Cenon Chapo, 75 years; Saturnino Chapo, 80 years; Rosa Chapo, 100 years; Maria Guachona, 95 years; Feliz Wichonla, 80 years; Antonia Quevas, 85 years; Marie Quilpe, 75 years; Dolores Quevas, 75 years.

It is further stipulated that C. W. Gates and Dan Cunningham would testify, if examined in this case, that John G. Downey in his lifetime, from the time he first took possession of Warner's ranch until his death, and since his death his administrator, has occupied and used for grazing cattle all of the lands described in the answer in this case which are not included within the fences, and that all of such land outside of such fences is, and has been during all of said time, destitute of cultivation of any kind, and that this stipulation shall be received as evidence of said facts.

It is further stipulated that E. L. Dorn and Leonardo Aulingawish would testify, if examined as witnesses on the subject, that the live stock
37 of the defendants herein has also used such lands outside of the fences for grazing purposes, during the period above mentioned, in common with the stock of plaintiff.

It is further stipulated that neither the defendants nor their ancestors ever presented their claims for the lands in controversy herein to the board of land commissioners for confirmation, which board of land commissioners was created under and by virtue of the act of Congress of the United States of March 3, 1851, entitled "an act to ascertain and settle the private land claims in the State of California."

It is further stipulated that the lands in controversy are included within the exterior boundaries of a confirmed Mexican grant known as the Valle de San José, for which United States patent issued to the predecessor in interest of John G. Downey, deceased, and of the plaintiff, in the year 1880, a copy of which patent is hereto attached and may be read in evidence. That a copy of the expediente, showing the proceedings of the Mexican Government, regarding said grant is annexed to this stipulation and may be read in evidence as an original.

It is further stipulated that John G. Downey in his lifetime was the owner of all right, title, and interest in and to the lands in controversy that passed by the said patent from the United States, and by the said grant from the Mexican Government, and paid all the taxes of every kind that were levied or assessed upon any and all of said lands from the issue of said patent till his death, and that since his death all taxes of every kind that have been levied or assessed against any and all of said lands have been paid by the plaintiff as the administrator and administrator with the will annexed of the estate of John G. Downey, deceased; and that John G. Downey died in Los Angeles County, State of California, on March 1st, 1894; and that the plaintiff is the administrator
38 with the will annexed of his said estate, duly and regularly appointed by the superior court of Los Angeles County, State of California.

It is further stipulated that E. L. Dorn would testify, if examined as a witness in this case, that under employment of the United States Indian Commission he surveyed the lands described in the answer in this case, in 1891, and that he made such survey from information and directions given him and corners and lines pointed out to him by certain of the old defendants as the true boundaries of their possessions, which defendants are and were at the time of such survey occupying said lands, and that such survey was correctly made, and that the lands so surveyed are correctly described in said answer. That in making such survey, he followed in the main the old fence lines bounding the Indians' cultivation, and whenever he went outside of the fences it was to include property that the Indians claimed to have formerly used, and which showed evidence of ancient Indian occupancy, such as ruins of houses and evidences of long-abandoned cultivation, and that such lands the Indians claimed to have always used for pasturing their horses, and they were actually so using them when the surveys were made.

It is further stipulated that J. J. Warner moved on to the Warner ranch in 1842; that Silvestre Portilla moved on to the land patented to him in 1834; that Ortego moved on to the Santa Ysabel ranch prior to said dates.

It is further stipulated that the name "Mattaguay" is the name by which the Indian settlement is commonly known that is located upon the land first described in the answer herein; that the name "San José" is the name by which the Indians' settlement is commonly known that is

39 located upon the lands last described in the answer herein; that the name "La Puerta" or "Puerta Nori" is the name by which the Indian settlement, located upon the second described tract of land set forth in the answer herein is commonly known.

It is further stipulated that all evidence introduced in the case of Downey v. Barker et al., No. 6919, in this court, may be considered in evidence in this case, so far as the same may be in any way applicable to the property in controversy.

It is further stipulated that this stipulation may be used as evidence of all the facts herein set forth, but it is understood that in making this stipulation neither party waives his right to object at the trial to the competency, materiality, or relevancy of any or all of the facts hereby admitted, or of any of the testimony used in case 6919 above referred to, which it is herein stipulated may be used as evidence in this case.

It is further stipulated that the answer to the complaint herein may be considered as the answer to the amended complaint, and that the said answer may be amended by interlineations as follows:

By adding as new parties Rosa Chapo, also known as Rosa Guachona, also known as Rosa la Powat, and that the name of defendant Josefa Wichonla be changed to Josefa Palawish, wherever said name appears.

WHITE & MONROE,
Attorneys for Plaintiff.
SHIRLEY C. WARD &
FRANK D. LEWIS,
Attorneys for Defendants.

The United States patent in the foregoing stipulation referred to, which is thereunto attached, is in the language following:

The United States of America, to all whom these presents shall come, greeting:

40 Whereas it appears from a duly authenticated transcript, filed in the General Land Office of the United States, that pursuant to the provisions of the act of Congress, approved the third day of March, A. D. one thousand eight hundred and fifty-one, entitled "An act to ascertain and settle the private land claims in the State of California," Silvestre de la Portilla, as claimant, filed his petition on the eighth day of November, A. D. one thousand eight hundred and fifty-two, with the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of Los Angeles, in which petition he claimed the confirmation of his title to "a certain tract of land called the Ville de San José," containing four square leagues, more or less, situate in the then county of San Diego and State aforesaid, said claim being founded on a Mexican grant to the petitioner made on the 16th day of April, A. D. one thousand eight hundred and thirty-six, by Nicholas Gutieviez, then lieutenant-colonel of the regular cavalry, general commandant, inspector, and political chief pro tem. of the territory of California.

And whereas the board of land commissioners aforesaid, on the twenty-first day of February, A. D. one thousand eight hundred and fifty-four, rendered a decree rejecting said claim, which decree or decision having been taken by appeal to the United States district court for the southern district of California, the said district court on the twenty-third day of

February, A. D. one thousand eight hundred and fifty-seven, in the cause entitled "Silvestre de la Portilla, appellant, vs. The United States, appellee," rendered its decree as follows, to wit:

The cause coming on to be heard on appeal from the final decision of the United States board of land commissioners to ascertain and settle the private land claims in the State of California, under "an act
41 of Congress approved March 3. 1851," upon a transcript of the proceedings and decision of said board, and of the papers and evidence upon which said decision was founded, and upon additional evidence filed in this court. And it appearing to the court that the said transcript and the notice of appeal have been duly filed according to law, and counsel for the respective parties having been heard.

It is ordered, adjudged, and decreed that the decision of said board of commissioners be, and the same is, in all things reversed.

And it is further adjudged and decreed that the claim of the appellant to the land herein claimed called "Valle de San José," and situated in the county of San Diego, is good and valid, and the same are hereby confirmed to him to the extent of four (4) square leagues and no more within the boundaries called for in the grant, and represented in the map in the expediente filed in the case to which the grant refers, reference for explanation of said map being had to the parol evidence filed in this court.

"Provided that should the quantity of land within said bounds be less than four square leagues, the confirmation is hereby made of such less quantity."

And that thereafter the Supreme Court of the United States at the December term, A. D. one thousand eight hundred and sixty-three, rendered a decree dismissing this cause, as appears by the mandate of said court, which was filed in the United States district court for the southern district of California; whereupon said district court on the tenth day of August, A. D. one thousand eight hundred and sixty-four, in the above-entitled cause, "ordered that the said decree of said court be affirmed, and the said appeal is hereby vacated and dismissed, and that the claim-
ant and appellant be allowed to proceed under said decree of this
42 court as under a final decree," whereby the proceedings of court upon title became final.

And whereas under the thirteenth section of said act of the 3rd of March, A. D. one thousand eight hundred and fifty-one, and the supplemental legislation, and in accordance with the proceedings had pursuant to said act and supplemental legislation, there has been deposited in the General Land Office a return with the descriptive notes and plat of the survey of the said claim, confirmed as aforesaid, authenticated by the signature of the United States surveyor-general for the State of California, which descriptive notes and plat of survey are in the words and figures as follows, to wit:

"U. S. SURVEYOR-GENERAL'S OFFICE,
"*San Francisco, Cal.*

"Under and by virtue of the provisions of the thirteenth section of the act of Congress of the third of March, 1851, entitled 'An act to ascertain and settle the private land claims in the State of California,' and of the twelfth section of the act of Congress approved on the 31st of

August, 1852, entitled 'An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the 30th of June, 1853, and for other purposes;'

"And whereas the U. S. district court for the southern district of California rendered a decision whereby it recognized and confirmed the claim of Silvestre de la Portilla to the tract of land designated as the Rancho 'Ville de San José,' as appears from the certified copy of the final decree of the said district court, a copy of which is hereunto annexed. The said tract of land was surveyed in conformity to the grant thereof and the said decision.

"And I hereby certify that the accompanying map is a
43 true and accurate plat of the said tract of land, as appears by the field notes of the survey thereof, made by William Minto, deputy surveyor, under the direction of this office, which survey having been examined and approved remain of record therein, and are in the words and figures following, to wit:

"Containing 17,634.6 acres, and designated on the official plat of public surveys as lot No. 40 of township 11 south, range 2 east; lot No. 40 of township 11 south, range 3 east; and lot No. 37 of township 11 south, range 4 east, all of the San Bernardino base and meridian.

"In testimony whereof I have hereunto signed my name officially, and caused my seal of office to be affixed in the city of San Francisco, this twentieth day of February, A. D. one thousand eight hundred and seventy-nine.

[SEAL.]

"THEO. WAGNER,
"*U. S. Surveyor-General of California.*"

Here follows the description of the lands described in the complaint herein:

Now, know ye, that the United States of America, in consideration of the premises and pursuant to the provisions of the acts of Congress aforesaid of third March, A. D. one thousand eight hundred and fifty-one, and the legislation supplemental thereto, have given and granted, and by these presents do give and grant, unto the said Silvestre de la Portilla, his heirs and assigns, the tract of land embraced and described in the foregoing survey, but with the stipulation that in virtue of the fifteenth section of the said act, neither the confirmation of this said claim nor the patent shall affect the interests of third persons.

To have and to hold the said tract of land with the appurtenances unto the said Sylvestre de la Portilla, his heirs and assigns, forever, with the stipulation aforesaid.

44 In testimony whereof I, Rutherford B. Hayes, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this tenth day of January, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

R. B. HAYES.
By W. H. CROOK, *Secretary.*

[SEAL.]

S. W. CLARK,
Recorder of the General Land Office.

Recorded Vol. II, page 189 to 205 inclusive.
Recorded at the request of Wells, Fargo & Co., February 20th, 1880, at 11 o'clock a. m. D. A. Johnson, county recorder, San Diego Co., California.

In pursuance of the first stipulation herein set forth, instead of introducing the full record of the field notes contained in the patent to Portillo, upon an examination of such field notes and map it was stipulated that in the field notes omitted from the above patent none of the Indian villages in question in this case are mentioned by name, but in the description in the second course occurs the following: "At 44 chains an Indian rancheria about 3 chains northeast of the line," and that this reference is to the most southerly of the two western villages.

In course 4 occurs the following: "At 99 chains, an old rancheria, about 14 chains northeast of the line." The description begins at the south corner of the ranch, where it joins the Santa Ysabel ranch.

On the map recorded as a part of the patent these two Indian villages are noted as being within the limits of the grant, a short distance north of the line running from the Santa Ysabel corner to the San Luis
45 Rey River. There is no mention of the Mataguay Indian village in the description, and it is not noted or marked on the map at all.

The expediente showing the proceedings of the Mexican Government, regarding the grant of the "Valle de San José" to Silvestre Portilla, is attached also to such stipulation, but we insert here only the commencement thereof and the formal grant from the Mexican Government contained therein, as the entire expediente is voluminous, and that portion of it omitted has no bearing in one way or the other upon the rights of the parties here. The portion of such expediente relevant is in the language following:

1834. Jurisdiction of San Diego.

"Expediente" on the place named "Valle de San José," petitioned for by Silvestre de la Portilla.

YEAR 1834.

General Brigade, Superior Political Chief of the Territory:

The citizen Silvestre de la Portilla, with all due respect, before you appears and says: That he is a native of the "Vailla del Fuerte," in the State of Sonora, and for the part five years resident of the port of San Diego, under your charge, and possessing some cattle, and having no place on which to place them in safety and to secure their increase, hopes, in your goodness, that you will please to grant him the place called "Valle de San José," which is situated at the entrance to the east road to the Colorado River, and distant from the mission San Diego, about twenty leagues, and from that of San Luis Rey twenty-one leagues, without interfering with other places which have always been vacant; besides said place has a creek and several permenant springs.

The valley is somewhat extensive, and therefore I respectfully pray you to have the goodness to grant me in property the said place
46 "Valle San José" to occupy it immediately with four hundred head of cattle, two drands of gentle mares, and some smaller stock,

and besides to cultivate the lands for his support, for which I will ever be grateful.

SILVESTRE DE LA PORTILLA.

Port of San Diego, February 20, 1834.

PUEBLO LOS ANGELES, *March 16, 1834.*

In conformity with the laws on the matter, the military commander of San Diego will please report whether the party interested in this case possesses the requisites to be attended in his petition, whether the land petitioned for is comprised within the twenty leagues from the land boundary and within the ten leagues from the seashore required by the law of August 18, 1824, whether it depends on rains or can be irrigated, whether it belongs to any private party, corporation, or pueblo, and everything else that may throw light on the matter, ordering that the party interested presents the plans he petitions for, which will be joined to this "expediente."

Having complied with all of this, the "expediente" will be forwarded to the R. R. fathers, ministers of the missions of San Diego and San Luis Rey, that they may report what they think proper.

José Figueroa, general brigade of the United Mexican States, commander superior political chief of Alta California, thus orders, decrees, and signs it, to which I testify.

JOSE FIGUEROA.

In the absence of the secretary.

BERNARDO NARVARRETE.

The party interested in this instance has all the requisites necessary to be attended in his position. The place he petitions for is not comprised within the twenty leagues bounding, nor within the ten littoral leagues. Part of it can be irrigated and others not. It is in the highway on which travel the people from Sonora, and would be useful there such an
47 establishment for their accommodation, for it is some twenty-four leagues inland to the east from this presido, and distant from the San Diego mission, some twenty-two leagues, and some twenty from that of San Luis Rey; and although at some time the mission San Diego had some stock thereon, and on account of its long distance had to take them away, or it was not well attended, as well as from the danger of the part of the wild Indians, who were very numerous there. On this account I am of the opinion that with this establishment there, and using good policy and harmony with them, they will become more friendly and civilized. Wherefore, in view of these facts which I have just exposed, you will decree what you think proper.

SANTIAGO AUGUELLO.

San Diego, April 8th, 1834.

The grant is as follows:

"Nicholas Gutierrez, lieutenant-colonel of stationary cavalry, commander and general inspector and provisional chief of the territory of Alta California.

Whereas the citizen Silvestre de la Portilla, Mexican by birth, has petitioned, for his own personal benefit and that of his family, the land

known by the name "San José," having previously complied with the information and investigation as required by the laws and regulations on the matter, exercising the powers which are conferred on me by decree of this day in the name of the Mexican nation, I have resolved to grant him the said land, declaring it to be his property, by these present letters, subject to the approbation of the most excellent commission and under the conditions following:

1. He shall be subject to the regulations that may be made for the distribution of public lands, and *and* that in the meantime neither the party benefited nor his heirs shall divide nor alienate it, nor bond
48 nor mortgage it, nor place it under any obligation, not even for any pious object, or homestead it.

2. He is allowed to fence it without interfering with the roads, cross-roads, and other usages. He may enjoy it freely and exclusively, turning it to agriculture or any other use he may see proper, but he shall within one year build a house on it, which must be occupied.

3. He shall petition the respective judge to give him judicial possession thereof, by virtue of this order, by which he shall mark out the boundaries, on whose limits he shall place the corner stakes, besides some fruit and wild trees of some utility.

4. The land which is hereby granted consists of (cuatro sitios de genado mayor), in the "Valle de San José," as explained in the plan attached to the "expediente." The judge who should give possession thereof shall have it surveyed according to law, leaving the residue which may be left to the nation for further uses.

If he should fail to comply with these conditions he shall forfeit his right to the land, and it will be denounceable by some other.

Wherefore I command that this presents be his title, and holding as good and valid, record of it to be entered into the proper book and be given to the party interested for his protection and other purposes.

Given in Monterey at the 16th of April, 1836.

CASTILLO."

The depositions referred to in the stipulation for submission of this cause, as having been taken, are the depositions taken of the witnesses on behalf of defendants at Warner's rancho, San Diego County, California, upon the 21st day of August, 1896, in pursuance of the stipulation of counsel.

The witnesses whose depositions were thus taken are as follows, and their ages are stipulated by counsel to be as follows:

49 Leonardo Aulingawash, age 85 years; Cenon Chapo, age 75 years; Saturnino Chapo, age 80 years; Rosa Chapo, age 100 years; Maria Guachona, age 95 years; Feliz Wichonla, age 80 years; Antonio Quevas, age 85 years; Mary Quilpe, age 75 years, and Dolores Cuevas, age 75 years. Such witnesses testified substantially as follows:

That they were all Indian defendants in this case (except Leonardo Aulingawish, who is an Indian living at the Agua Caliente Indian village on Warner's ranch); that they had known the Indian villages on Warner's ranch in San Diego County, known as Mattawai, San José, and La Puerta or Puerta Nori, since they were children, and as far back as they could recollect; that they knew each place long before Silvestre Portilla or Juan Largo (Colonel J. J. Warner), came onto the ranch; that there

were more Indians in those villages in those early times than there are now; that many of the old ones have died off; that the Indians used their lands at such places, in such early times, for sowing wheat, corn, and beans, and other things, and that in those early times the Indians of those villages were under the charge of the mission padres until the missions broke up; that the Indians have continued to live at such places ever since and to use their lands there in the same way; that they (the Indians testifying) have always lived there; that they plant more now than they did then, but the lands they claim outside of their planting fields were then used for pasture, as they are now, but that the stock of Governor Downey, belonging to the ranch, pasture right up to the Indian fences. Cenon Chapo, Feliz Wichonla, and Antonio Quevas identified the defendants who did not testify in this case as being Indians residing upon the lands in question and who had resided their all their lives, and as being either children, or brothers and sisters, or husbands and wives of some of the old witnesses who had testified, or of old Indians now dead, who lived in such villages before their death.

It was stipulated that Angel Quilpe might be considered as having been sworn for defendants and testified that he was the Indian who pointed out to Mr. Dorn, the surveyor, the boundaries of the lands that were occupied by the Mattawai Indians at the time Juan Largo came to Warner's ranch, and that the Indians had occupied the lands within the boundaries so pointed out to Dorn, and that the kind of occupancy was the same then as now, and has continued the same ever since.

It was also stipulated that Juan Largo and J. J. Warner were the same person.

To all the testimony of the foregoing witnesses plaintiff interposed the following objections, viz:

That such testimony is immaterial, incompetent, and irrelevant, on the ground that the possession of the parties referred to is immaterial in this case.

That the patent of the United States Government controls the mere matter of possession of the Indians or anyone else, which might have been exercised at any time.

That the patent can not be affected or controlled, varied, or impaired by the oral declaration of witnesses as to the occupancy or possession of parties who never made any attempt to perfect their possession so that the same could ripen into title, and that the written evidence of title is controlling upon the court as against the mere oral declarations of these witnesses.

This objection was interposed by plaintiff to the testimony of the defendants' witnesses at the beginning of the taking of their testimony, and it was stipulated that it should apply to all the testimony of all of such witnesses. These witnesses were cross-examined by plaintiff, but with the distinct stipulation that such cross-examination might be withdrawn if the court upheld the foregoing objection to the testimony in chief of such witnesses.

At the time of the decision of the cause such objection was sustained by the court to all of the defendants' testimony, hence, all of such evidence was stricken out by the court and not considered, and an exception granted to defendants.

Such ruling the defendants specify as error.

All of the stipulated facts and evidence set forth in the foregoing stipulations were stipulated to be in, subject to the foregoing objection of plaintiff, which applied as well to all of such stipulated facts and evidence as to the oral testimony of the witnesses whose depositions were actually taken; and such objection was, upon the decision of the cause, sustained as to such stipulated facts and evidence, as well as to the oral evidence of defendants' witnesses; an exception being granted to defendants, which ruling defendants specify as error. The only evidence remaining before the court, after such ruling was made, being the U. S. patent to Portilla, and the stipulation that plaintiff owned all title that passed by such patent to the patentee, and that plaintiff and his predecessor in interest had paid all taxes levied and assessed upon the premises in controversy, ever since the issue of such patent, and the stipulation that neither defendants nor their ancestors had ever presented their claims to the lands in controversy to the board of land commissioners appointed under the act of Congress of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

The court entered its decision herein upon the 29th day of December, 1896, giving judgment for plaintiff, and against defendants.

52 Defendants, upon the 8th day of January, 1897, filed herein and served upon counsel for plaintiff a notice of intention to move for new trial in said cause, basing said motion upon the minutes of the court, the pleadings, papers filed, exhibits, and evidences in said cause. Said notice of motion, including detailed specifications of error, is in the language following:

In the superior court of the county of San Diego, State of California.

J. Downey Harvey, administrator, with the will annexed, of the estate of John G. Downey, deceased, plaintiff, vs. José Quevas et al., defendants.

No. 8324. Notice of intention to move to set aside decision, and for a new trial.

You will please take notice, that the following named defendants herein, viz: Jesus Quevas, sometimes called Jesus Quevo, and named in the complaint herein as Henry Roe Quevas; José Quevas, sometimes called José Quevo; Antonio Cuevas, sometimes called Antonio Cuevo; José Maria, named in complaint as John Green; Francisca Quilpe, named in complaint as Mary Green; Maria Quilpe; Dolores Quevas, sometimes called Dolores Cuevo; Rufina Quevas, sometimes called Rufina Cuevo; Marcia Quevas, sometimes called Marcia Cuevo; Antonia Quevas, sometimes called Antonia Cuevo; Maria Nacho, named in complaint herein as Sarah Green; Angel Quilpe; José Dolores Palawish, sometimes called José Dolores; José Feliz, sometimes called Feliz Wichonla; Madelena Palawish; Matilda Quevas, sometimes called Matilda Palawish; Jacobo Palawish, sometimes called Acovo Palawish; José Juan, sometimes called José Juan Palawish; Jacobo Dominga Palawish; Maria Antonio Guachona, sometimes called Maria Antonia Wichonla; Maria Jesus Colol; Sebastian Palawish; Josefa Palawish, sometimes

53 called Josefa Guachona, and sometimes called Josefa Wichonla; Maria Los Angeles Palawish; Manuel Palawish; Pelegrino

Palawish; José La Luz; Saturnino Chapo; Julian Chapo, named in complaint herein as John Black; Concession Chapo, named in complaint herein as Jane Doe Quevas; Juan Quaja, named in complaint herein as John Doe Quevas; Patricio Quaja, named in complaint herein as Patricio Qusjo; Susana Quaja, named in complaint herein as Mary Doe Quevas; Maria Antonio Sobermuta, named in complaint herein as Dolores Sanone; Matilda Osun, named in complaint herein as Dolores Doe; Cenon Chapo; Renea Chapo; Louisa Chapo, named in complaint herein as Sanone Doe; Maria Guachona, named in complaint herein as Sanone Roe; Maria Antonia Guachona, named in complaint herein as Feliz; and Rosa Guachona, sometimes called Rosa Chapo, and also known as Rosa La Powat, intend to move this court in the above-entitled action that an order be made and entered therein that the decision of the court heretofore rendered, made, and entered therein, and that the judgment heretofore entered in said action upon said decision be vacated and set aside, and that a new trial be granted on the following grounds, to wit:

First. Errors in law occurring at the trial and excepted to by the the defendants;

Second. That the decision and judgment is against law;

Third. Insufficiency of evidence to justify the decision and verdict.

Said motion will be based upon the minutes of the court, and the pleadings, papers filed, exhibits, and evidence in said cause.

And the defendants hereby specify the following errors in law, occurring upon the trial of said cause, and excepted to by defendants, viz:

54 A. The court erred in sustaining the objection of plaintiff's counsel to the following question propounded by defendants' counsel to Leonardo Aulingawish, a witness on behalf of defendants, viz: "Were there Indians living there at that time?" Plaintiff's objection to such question being as follows:

"Plaintiff's counsel object to the question as immaterial, incompetent, and irrelevant, on the ground that the possession of any parties referred to is immaterial in this case; that the patent of the United States Government controls the mere matter of possession, which might have been exercised in 1850, or at any other time by the Indians, or anyone else; that the patent can not be affected, controlled, varied, or impaired by the oral declarations of witnesses as to the possession or occupancy of parties who never made any attempt to perfect their possession, so that the same can ripen into title; and that the written evidence of title, to wit, the patent, is controlling upon the court, as against the mere oral declarations or intention of this witness.

"Furthermore, that if it is attempted to establish any ancient right, if any such thing there be, the condition of affairs at the time mentioned by the question is immaterial."

The objection was sustained by the court, and it was stipulated that the same objection might be considered in and applying to all testimony taken in the case; and while there are no other rulings of the court noted upon the depositions taken, it is understood that by sustaining such objection the court did thereby sustain the same objection to all evidence offered by defendants, and defendants now specify such ruling of the court in sustaining such specific objection, and such general objection to all of the evidence offered, as error.

55 B. The court erred in excluding and not admitting in evidence the testimony of the following witnesses, whose depositions were taken under stipulation of the parties hereto, viz, the testimony of Leonardo Aulingawish, Cenon Chapo, Saturnino Chapo, Rosa Chapo, Maria Guachona, Feliz Wichonla, Antonio Quevas, Marie Quilpe, Dolores Quevas, for the reason that the testimony of each and all of such witnesses tended to show, and taken together did show, the fact, character, and extent of the use, occupancy, and possession of defendants and their ancestors of the premises in controversy from a time prior to the inception of the plaintiff's title from the Mexican Government down to date, and such testimony taken together did establish the fact that the defendants and their ancestors were Mission or Pueblo Indians, and that they had been in the continuous, undisputed, and undisturbed use, occupancy, and possession of the premises claimed by them in their answer, ever since, and for a long time prior to the inception of plaintiff's title thereto, claiming the same of their own right.

C. By stipulation of the parties, it was agreed that all the evidence taken in the case of Downey vs. Barker, No. 6919 of this court, might be considered in evidence in this case, so far as the same might in any way be applicable to the property in controversy, and although the record contains no showing that any part of such evidence was excluded or rejected, or ruled out by the court, we understand that all of the evidence that the defendants offered in the case of Downey vs. Barker was excluded by the court for the same reason that the court excluded the testimony of Leonardo Aulingawish and the other witnesses named in the above specifications of error A and B; and defendants specify such ruling of the court in excluding such evidence as error, for the

56 reason that such evidence taken together with the evidence excluded and specifically referred to in specifications of error in A and B above established the fact that the defendants were and for a long time prior to the inception of plaintiff's title from the Mexican Government had been Mission or Pueblo Indians, and that they and their ancestors during all of such time had been in the continuous use, occupancy, and possession of the premises claimed by them in their answer, claiming the same of their own right.

Defendants specify the following respects in which the evidence is insufficient to justify the decision and judgment of the court, viz:

1st. The evidence is insufficient to justify Finding I of the court, "That all of said defendants last above-named are Indians and half-breed Indians," in this: That after ruling out and excluding all of the evidence excluded by the court, as hereinabove stated, there was no evidence of any character to show as to whether or not the defendants, or any of them, were Indians or half-breed Indians;

2nd. There is not sufficient evidence to support or justify Finding II of the court that plaintiff is the owner in fee simple of the lands described in said Finding II or any part thereof, except by wrongfully and unlawfully excluding all of defendants' evidence, which was wrongfully and unlawfully excluded by the court, as hereinabove stated.

That defendants specify this finding as being not sustained by the evidence, for the reason that had the evidence introduced by the defendants and wrongfully excluded been admitted, the same would have

established the fact that plaintiff was not the owner in fee simple of the property described in paragraph 2 of said finding, but would have established the fact that the plaintiff's ownership was subject and sub-
57 ordinate to the continued right of use, occupancy, and possession by defendants of the premises *of the premises* claimed in defendants' answer.

Therefore defendants state that Finding II of the court is not sustained by the evidence, but is contrary to the evidence.

3rd. Defendants state that there is not sufficient or any evidence to justify that portion of Finding III of the court "that the claims of the defendants and each of them are without right, title, or interest whatever in or to said lands or premises, or any part thereof," in this, that had the evidence offered and introduced on behalf of defendants not been rejected and excluded, the same would have shown beyond question that the defendants and each of them are entitled to the continued use, occupancy, and possession of the premises claimed by them in their answer.

4th. There is not sufficient evidence to sustain or justify that portion of Finding IV of the court which holds that plaintiff has the ownership in fee simple of the lands and premises described in the complaint, in that, had the evidence offered and introduced by defendants not been wrongfully excluded by the court, the same would have shown that plaintiff's title to said premises was subject and subordinate to the continued right to the use, occupancy, and possession thereof by the defendants, as in their answer alleged; and for the same reason defendants allege that that portion of Finding VI of the court, holding "that said John G. Downey in his lifetime, and at the time of his death, was the owner in fee simple of all of the lands in the complaint described," is not sustained or justified by the evidence.

5th. Finding VII of the court holding that these defendants are not, and that none of them are, and that their ancestors were not, nor were any of them at the time of the acquisition from the Mexican Gov-
58 ernment by the United States of the territory embraced within the State of California, and for more than thirty (30) years prior thereto, or at all, recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and the United States, and were not in the adverse possession, occupancy, or use of the lands described in said Finding VII, is not and no part thereof is sustained by the evidence, in this, that had the evidence offered by defendants and erroneously excluded by the court, as hereinabove set forth in the specifications of error committed by the court, been admitted, as it should have been, the same taken together would prove and establish the fact that the said defendants are now, and that they and their ancestors were at the time of the acquisition from the Mexican Government by the United States of the territory embraced within the State of California, and for more than thirty years prior thereto were, and were recognized as Mission or Pueblo Indians by the laws of Spain, Mexico, and the United States, and were during all of such period in the adverse possession, occupancy, and use of the premises claimed by them in their answer herein; and that portion of such finding holding that the defendants have never been in the adverse possession, occupancy, or use of any of the lands claimed by them, and have never acquired, and did not have or hold any interest or title in said lands or any part thereof,

and that they are not, nor is either of them, in equity or otherwise, the owner or owners of or entitled to the possession, occupancy, or use of the said lands or any of them, but that plaintiff is entitled to the immediate possession of all said lands, is not, nor is any part thereof, sustained or justified by the evidence herein, in that, had all the evidence offered and introduced by defendants, which was rejected and excluded by the court,

59 as stated in defendants' specifications of error, already hereinabove set forth, been admitted, as the same should have been, it would have established the fact that defendants and their ancestors have, for a period beginning as much as thirty years prior to the acquisition of California by the United States from the Mexican Government and continuing to date, been in the adverse possession, occupancy, and use of the lands by them claimed in their answer, and have acquired the right to continue the use, occupancy, and possession of said lands and every part thereof, and are in equity the owners of and entitled to such right of possession, occupancy, and use of said lands, and that plaintiff is not entitled to the possession of the same or any part thereof.

6th. There is not sufficient evidence, or any evidence, to justify Finding VIII of the court that the grant of the Mexican Government to the predecessors of plaintiff of the lands in the complaint described was not made subject to or in subordination to the rights of the defendants, their ancestors or predecessors, or any of them, in this, that had all of the evidence offered and introduced by defendants, which was wrongfully and unlawfully rejected by the court, as hereinabove alleged in defendants' specifications of error, been admitted, the same would have shown and demonstrated that all rights of the plaintiff to the ownership of the property in controversy was subject and subordinate to the rights of the defendants, their ancestors and predecessors, to the continued use, occupancy, and possession of the premises in controversy.

7th. That Findings IX and X of the court are not sustained by, but are contrary to, the evidence herein, in the same particulars alleged and for the same reasons given as to Findings VII and VIII.

8th. That Findings XI and XII are not sustained by, but are

60 contrary to, the evidence in the same particulars and for the same reasons given as to Findings VII and VIII.

9th. That no portion of Finding XIII is sustained by the evidence, in this, that if all the evidence offered and introduced by defendants, which was admissible, had been admitted, and not excluded and rejected by the court, as alleged hereinabove in the specifications of error committed by the court, such evidence would have established and proven that the defendants and their ancestors at the time of the acquisition by the United States from Mexico of the territory embraced in the State of California, and for thirty years prior thereto, were Mission or Pueblo Indians, and that they occupied and held possession of the lands claimed by defendants in their answer herein, under and by virtue of the laws and regulations of the Government of Mexico, and under a claim of rights so to do, and that they were entitled by said laws and regulations so to use and occupy, said lands against all and any parties whatever, and that such rights so to use, occupy, and possess said lands by defendants in their answer was established and guaranteed by the laws and regulations of the Mexican Government at the time of the grant by the Mexican Gov-

ernment to the plaintiff's predecessors in interest of the lands in controversy and at the time of the transfer of sovereignty from the Mexican Government to the United States, and that the United States did, by the treaty of Guadalupe Hidalgo and by the general law of nations, recognize and stipulate to protect such right and title of defendants and their ancestors to such use, occupancy, and possession of said lands; and such evidence, had the same been admitted by the court, as it should have been, would have proven and established the fact that the lands claimed by defendants, as described in their answer, were
61 not subject, under the laws of Mexico to private grant by the Mexican Government, and that the grant, or purported grant, upon which plaintiff's title rests was subject and subordinate to the continued rights of defendants and their ancestors to the continued use, occupancy, and possession of the said premises, and would have further established the fact that the issuing of the patent by the United States Government, under which plaintiff's claim, and the confirmation of the grant, upon which said patent is based, was not intended to convey the lands and premises therein described absolutely without regard to the rights or claims of any of the said defendants, and without being subject or subordinate to any rights or claims of said defendants, but the said patent was issued and the said grant confirmed subject and subordinate to the rights and claims of these defendants and their ancestors to remain in the undisturbed use, occupancy, and possession of the said premises, and that the patent, in so far as the same failed to recognize upon its face such right of use, occupancy, and possession, was a cloud upon the title of the said defendants.

That the facts agreed upon in the stipulation before submission of this cause show that the court erred in each and all of its findings, and especially Finding XIII, for the reason that such facts so agreed upon in such stipulation show that the premises in controversy herein were, at the time of the inception of plaintiff's rights under the Mexican Government, all Indian villages, and show also that the rights of such Indians thereupon constituted a continuing servitude and burden subject to which said grant upon which plaintiff relies as the foundation of his title was based.

The defendants allege that owing to the errors of the court, as hereinabove specifically pointed out, in the rejection and exclusion of defendants' evidence, and owing to the findings of the court, as
62 above specified, being unsupported by the evidence introduced by defendants, which should have been admitted, the decision and judgment of said court is against law.

Wherefore defendants ask that an order be made and entered by the court that the decision by the court heretofore rendered, made, and entered herein, and the judgment heretofore entered in this action upon said decision be vacated and set aside, and that a new trial be granted upon the grounds hereinabove alleged.

SHIRLEY C. WARD &
FRANK D. LEWIS,
Attorneys for Defendants.

Dated this 8th day of January, 1897.

To the plaintiff herein and to his attorneys, Messrs. White and Monroe.

That said motion for new trial came on for hearing before the court upon the ninth day of February, 1897, and said motion was fully argued and submitted to the court, the same being heard by Judge E. S. Torrence, as Judge Pierce, who decided the cause, had retired from office, his said term of office having expired, and he was no longer judge of said court.

That upon the presentation and argument of such motion, it was assumed by counsel that all of the objections interposed by plaintiff to the evidence offered by defendants had been sustained and all of such evidence held by the court to be immaterial, and that the only question to be passed upon by the court upon such motion for new trial was as to whether or not the evidence so offered by defendants was material or admissible to in any way affect, vary, or control the rights of the plaintiff under the patent from the United States to Silvestre Portilla, and only such question was presented in the argument of such motion, and the suf-

63 ficiency of such evidence as was offered by defendants and excluded by the court, to establish the position of defendants, as set up in defendants' answer, was in no way controverted upon such argument, and in passing upon such motion the court considered only the question of law as to whether defendants' evidence was material and relevant, and its sufficiency was in no way considered or gone into.

That upon the twenty-fourth day of April, 1897, the said motion of defendants for new trial of said cause was denied by the court, and a minute entry of such order denying such motion duly entered, and defendants present the foregoing as a correct statement on appeal in said cause.

SHIRLEY C. WARD and
FRANK D. LEWIS,
Attorneys for Defendants.

The foregoing statement on appeal proposed and presented within time stipulated by the parties, the same is correct, and it is agreed the same may be settled by the court, as above engrossed.

SHIRLEY C. WARD &
FRANK D. LEWIS,
Attys. for Defts.

WHITE & MONROE,
Attys. for Plff.

Dated Oct. 25, '97.

This statement settled this 28th day of Oct., 1897.

E. S. TORRENCE, *Judge.*

[Copy from clerk's minute book, Saturday, April 24th, 1897.]

[Title of cause.]

On this day defendants' motion for a new trial of this cause, heretofore submitted, is by the court denied.

64 [Title of court and cause.]

Notice of appeal.

You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of the State of California from the judgment of the above-entitled cause, entered upon the 29th day of December, 1896, in favor of plaintiff and against the defendants in said action, and from the whole thereof, and also from the order of the said

superior court of San Diego County denying defendants' motion for a new trial of the said cause, made and entered in the minutes of the said court on the 24th day of April, 1897, and from the whole thereof.

Dated this the 22nd day of June, 1897.

Yours, etc.,

SHIRLEY C. WARD and
FRANK D. LEWIS,
Attys. for Defendants.

To the clerk of the said superior court and to Messrs. White & Monroe, attorneys for plaintiff.

(Endorsed:) Service of within accepted this 22nd day of June, 1897. White & Monroe, attorneys for plffs. Filed June 23rd, 1897. Will H. Holcomb, clerk.

65 *Stipulation as to correctness of transcript.*

It is hereby stipulated that the foregoing transcript on appeal contains a correct copy of the judgment roll, the statement on appeal, the minute entry of order denying defendants' motion for new trial, and the notice of appeal filed in said cause No. 8324 in the superior court of San Diego County, California. And it is further stipulated that a good and sufficient undertaking on appeal was duly filed in said cause within the time prescribed by law.

WHITE AND MONROE,
Attorneys for Plff.
SHIRLEY C. WARD and
FRANK D. LEWIS,
Attys. for Defts.

66 (Indorsed:) Received copy of within for the judge who tried the case, this day of November, 1897. Will H. Holcomb, clerk. By , deputy. Service accepted by copy this 27th day of November, 1897. White & Monroe, attorneys for plaintiff.

67 Filed October 4, 1899. In bank.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE ESTATE of John G. Downey, deceased, plaintiff and respondent,
vs.
JOSE QUEVAS ET AL., DEFENDANTS AND APPELLANTS. } L. A. No. 489.

By the court:

This case and Harvey, administrator, etc., vs. Barker et al., L. A. No. 490, just decided, involve similar propositions, and were argued and submitted together. Upon the authority of that case the judgment herein is affirmed.

68 In the supreme court of the State of California.

L. A. No. 489. Bank.

J. DOWNEY HARVEY, ETC., ADM., respondent,
vs.
JOSE QUEVAS ET AL., APPELLANT'. } On appeal from the superior court in and for the county of San Diego.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law

and premises having been fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the county of San Diego, in the above-entitled cause, be, and the same is hereby, affirmed.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 4th day of October, 1899, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 4th day of November, A. D. 1899.

[SEAL.]

GEO. W. ROOT, *Clerk.*
By J. J. DUNCAN, *Deputy.*

(Indorsed:) L. A. No. 489. In the supreme court, State of California. Remittitur. Harvey, adm., vs. Quevas et al. Clerk's costs, $. Paid by appellant, $12.50. Paid by respondent, $. Total, $12.50. Geo. W. Root, clerk. By J. J. Duncan, deputy.

69 Supreme Court of the United States.

JESUS QUEVAS, SOMETIMES CALLED JESUS CUEVO, named in complaint herein as Henry Roe Quevas, José Quevas, sometimes called José Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; José Maria Quilpe, named in complaint as John Green; Francisca Quilpe, named in complaint as Mary Green; Maria Quilpe, Dolores Quevas, sometimes called Dolores Cuevo; Rufina Quevas, sometimes called Rufina Cuevo; Marcia Quevas, sometimes called Marcia Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; Maria Nacho, named in complaint herein as Sarah Green; Angel Quilpe, José Dolores Palawish, sometimes called José Dolores; José Felix, sometimes called Felix Wichonla; Madelina Palawish, Matilda Quevas, sometimes called Matilda Palawish; Jacobo Palawish, sometimes called Acovo Palawish; Jose Juan, sometimes called José Juan Palawish; Jacobo Dominga Palawish; Maria Antonia Guachona, sometimes called Maria Antonio Wichonla; Maria Jesus Colon, Sebastian Palawish, Josefa Guachona, sometimes called Josefa Wichonla; Maria Los Angeles Palawish, Manuel Palawish and Pelegrino Palawish, plaintiffs in error,

vs.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE estate of John G. Downey, deceased, defendant in error.

In error to the supreme court of the State of California.

Assignments of error.

70 Now come the plaintiffs in error and for assignment of error in this case allege that the supreme court of the State of California

in giving its decision and judgment in the above entitled cause did commit error as follows, to wit:

ASSIGNMENT OF ERROR NO. 1.

This is an action to quiet title to and recover possession of certain lands in San Diego County, California. The plaintiff assert title to the lands in controversy under and by virtue of a United States patent based upon a confirmed Mexican grant; such patent having been issued under and in pursuance of proceedings had under the act of Congress of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

The defendants in possession claim to be Mission Indians, and that they have been in the possession, use, and occupancy of these lands ever since a time long prior to the date of the Mexican grants upon which plaintiffs' title is based, and that during all of such time they have claimed the right so to use, occupy, and possess such property as against all the world, without, however, the right to dispose of the same; and they claim that under and by virtue of the Spanish and Mexican law existing in the ceded territory prior to the transfer of sovereignty to the United States, Indians such as these were entitled for themselves and their descendants to the continued use and occupancy of the lands of which they were possessed and which they were using, so long as they or any of
their descendants remained in such possession and use, without,
71 however, having the power of alienation; and all private grants
of such lands made by the Mexican Government were under the law subject to such general right of use and occupancy in the Indians, although the grants including such lands were silent upon this subject. Defendants further claim, however, that in the grant upon which plaintiffs' title rests, the defendants' right to continued use and occupancy of these lands was expressly preserved and protected; they claim that under and by virtue of the provisions of the treaty of Guadalupe Hidalgo between the United States and the Government of Mexico, their usufructuary rights in these lands were preserved and protected. Defendants never presented their claims to their usufructuary rights in these lands to the board of land commissioners appointed under the act of Congress of March 3rd, 1851, entitled an "An act to ascertain and settle the private land claims in the State of California," and it is their claim that they were relieved of the necessity of presenting their claims to such board, for the reason that the sole purpose of the act of Congress in question was to segregate private property from public domain and to fix the boundaries of each, and that proceedings had and patents issued thereunder were binding upon the United States and the claimant only and upon parties claiming under the United States by title subsequent to the change of sovereignty, but were not binding upon third persons claiming an interest in the lands by a right or title prior and paramount to that confirmed and patented. And defendants claim that the requirements of such law as to these lands were fully met and complied with, and such lands adjudged to be private property, and not a part of the public domain by the
presentation to the board of land commissioners of the claim of one
72 Silvestre Portillo therefor (plaintiffs' predecessor in interest, the
original grantee from the Mexican Government), and by the confirmation and patenting of such claim that this vested the legal title in

Portillo, and operated to relieve the defendants from the necessity of presenting their claims to such board, but did not change the character or extent of Portillo's claim or title, but the same remained just as formerly subject to the usufructuary rights of the defendants, and charged with all of the lawful uses and subject to all of the lawful trusts previously existing. That the defendants are "third persons," as such term is used in the 15th section of the statute in question, whose rights are not concluded by proceedings had thereunder. That, as under the Mexican régime the grantee held the legal title in trust for the defendants who were the beneficial owners entitled to the use and enjoyment of the lands, this relation of privity of estate and trust was not cut off or extinguished by confirmation and patent to the grantee Portillo. Defendants further claim that they were wards of the Mexican nation, and by the transfer of sovereignty became and ever since have been wards of this nation, and that it was not intended that they should be compelled to present their claims to the board of land commissioners for confirmation under penalty of forfeiture for failure so to do.

Plaintiff on the other hand claim that the patent from the United States is conclusive of the entire controversy, and that all evidence as to the defendants being Mission Indians, or as to their ancient and continued use, occupancy, and possession of these lands is immaterial and
73 inadmissible, and all of such evidence was objected to on that ground. All testimony of defendants was introduced under such objections of plaintiff and was permitted temporarily to be received, but such objections thereto were subsequently, after the cause had been submitted, sustained, and all of such testimony of defendants stricken out and judgment given for plaintiff, and defendants' motion for a new trial denied. This position has been sustained by the supreme court of California, Chief Justice Beatty and Justices Macfarland and Temple dissenting, the majority of said court having held that the patent to plaintiffs' predecessor in interest was conclusive of the entire controversy, and that all claims of the defendants were lost by not being presented for confirmation to the board of land commissioners appointed under the act of Congress above mentioned; that defendants were not third persons whose rights were protected under the 15th section of such act of Congress, but were mere strangers to the title, and that all evidence as to the former property rights of such defendants and their ancestors under the Mexican law was therefore immaterial, inadmissible, and properly stricken out.

Plaintiffs in error claim that the supreme court of California committed error in its judgment, as follows:

First. In holding that the patent under which plaintiff below, defendant in error here, held title was conclusive of the entire controversy between the parties.

Second. In sustaining the decision of the trial court excluding all of the evidence of the defendants below, plaintiffs in error, showing
74 their rights under the Mexican law in the lands in controversy.

Third. In holding that all claims, including those of Mission Indians to property in California derived from the Spanish or Mexican Government, were lost if not presented to the board of land commissioners for confirmation under the act of Congress of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

Fourth. In holding that defendants below, plaintiffs in error, were strangers to the title and not "third persons" under the 15th section of the act of Congress of March 3rd, 1851, above referred to.

Plaintiffs in error claim that the error committed by the supreme court of the State of California in its judgment as aforesaid is reviewable by this court, on the ground that the judgment of said supreme court of California is against the title, right, privilege, and exemption specifically set up and claimed by plaintiffs in error under the treaty between the United States and Mexico known as the treaty of Guadalupe Hidalgo, and under the act of Congress of the United States of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

ASSIGNMENT OF ERROR NO. 2.

The assignments of error in the decision of the trial court—the superior court of San Diego County, California—upon defendants motion in said court for a new trial of said cause—the same appearing in the
75 transcript on appeal from said lower court to the supreme court of the State of California—are each and all well taken, and constitute good and sufficient grounds for the reversal of said trial court by the supreme court of the State of California, and each and every assignment of error contained in such transcript on appeal—both as to errors of law occurring at the trial and duly excepted to, and as to specifications of the insufficiency of the evidence to justify the decision and judgment of the court—are hereby reiterated and deemed repeated as a portion of this assignment of error in the judgment and decision of the supreme court of the State of California, as fully as if the same had been here repeated in full, reference being made to such transcript on appeal for a full statement thereof.

Wherefore plaintiffs in error allege that, in the particulars set forth in such assignments of error in said transcript on appeal contained, the judgment of the supreme court of the State of California affirming the decision of the trial court is error, reversable by this court, in that it is against the title, right, privilege, and exemption specifically set up and claimed by plaintiffs in error under the treaty between the United States and Mexico known as the treaty of Guadalupe Hidalgo, and under the act of Congress of the United States of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

Wherefore plaintiffs in error pray that the said judgment
76 of the supreme court of the State of California against them rendered on the 4th day of October, 1899, may be reversed and that judgment be rendered for plaintiffs in error as prayed for in their original answer filed in said cause.

SHIRLEY C. WARD.
FRANK P. FLINT.
FRANK D. LEWIS.
Attorneys for Plaintiffs in Error.

(Indorsed:) L. A. 489. Filed Nov. 6, 1899. Geo. W. Root, clerk. By A. W. Johnson, deputy.

77 In the supreme court of the State of California.

J. DOWNEY HARVEY, ADMINISTRATOR, ETC., plaintiff and respondent, *vs.* JOSÉ QUEVAS, ET AL., DEFENDANTS AND appellants. } L. A. No. 489.

Petition for writ of error.

Defend*end*ants in the above-entitled cause, feeling themselves aggrieved by the judgment entered therein upon the 4th day of October, 1899, come now, by Frank P. Flint, United States attorney for the southern district of California, Shirley C. Ward, and Frank D. Lewis, their attorneys, and petition the court for an order allowing said defendants to prosecute a writ of error to the honorable United States Supreme Court under and according to the laws of the United States in that behalf made and provided; and such writ of error having been directed to be taken to the United States Supreme Court by the Department of Justice of the United States, and no bond in such case being required by law, and all bond having been specially waived by stipulation of the plaintiffs on file herein, which said stipulation consents that writ of error herein shall operate as a supercedeas, it is therefore asked that all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Supreme Court.

And your pe'itioners will ever pray.

SHIRLEY C. WARD.
FRANK D. LEWIS.
FRANK P. FLINT.
Attorneys for Defendants.

(Indorsed:) L. A. 489. Filed Nov. 6, 1899. GEO. W. ROOT, clerk. By A. W. Johnson, deputy.

78 In the Supreme Court of the United States.

J. DOWNEY HARVEY, ADMINISTRATOR, ETC., plaintiff and respondent, *vs.* JOSÉ QUEVAS, ET AL., DEFENDANTS AND appellants. } L. A. No. 489.

Order allowing writ of error without bond.

Upon filing petition for writ of error in the above-entitled cause, and on filing an assignment of errors, it is ordered that a writ of error be and is hereby allowed to have reviewed in the United States Supreme Court the judgment heretofore entered herein; and such writ of error having been directed to be taken by the Department of Justice of the United States, and plaintiffs having filed herein a stipulation in writing waiving all bond and consenting that writ of error shall operate as supercedeas staying execution of the judgment in this cause until the writ of error was finally determined by the United States Supreme

Court, it is therefore ordered that the writ of error hereby allowed shall operate as a supercedeas and shall stay execution of the judgment of this court pending the action of the Supreme Court of the United States thereon.

W. H. BEATTY.
Chief Justice of the Supreme Court of the State of California.

(Indorsed:) L. A. 489. Filed Nov. 6, 1899. Geo. W. Root, clerk. By A. W. Johnson, deputy.

79 UNITED STATES OF AMERICA, ss.

To J. Downey Harvey, administrator of the estate of John G. Downey, deceased:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of California, wherein Jesus Quevas, sometimes called Jesus Cuevo, named in complaint herein as Henry Roe Quevas; José Quevas, sometimes called José Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; José Maria Quilpe, named in complaint as John Green; Francisca Quilpe, named in complaint as Mary Green; Maria Quilpe; Dolores Quevas, sometimes called Dolores Cuevo; Rufina Quevas, sometimes called Rufina Cuevo; Marcia Quevas, sometimes called Marcia Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; Maria Nacho, named in complaint herein as Sarah Green; Angel Quilpe; José Dolores Palawish, sometimes called José Dolores; José Felix, sometimes called Felix Wichonla; Madelina Palawish; Matilda Quevas, sometimes called Matilda Palawish; Jacobo Palawish, sometimes called Acovo Palawish; José Juan, sometimes called José Juan Palawish; Jacobo Dominga Palawish; Maria Antonia Guachona, sometimes called Maria Antonio Wichonla; Maria Jesus Colol; Sebastian Palawish; Josefa Guachona, sometimes called Josefa Wichonla; Maria Los Angeles Palawish;
80 Manuel Palawish, and Pelegrino Palawish are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this the 6th day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

81 Due service and receipt of a copy of the within and foregoing citation admitted this the 10th day of November, A. D. 1899.

WHITE & MONROE,
Attorneys for Defendant in Error.

Due service and receipt of a copy of the within and foregoing citation admitted this the 13th day of November, A. D. 1899.

J. DOWNEY HARVEY,
Administrator, etc., Defendant in Error.

82 (Indorsed:) In the Supreme Court of the United States. Jesus Quevas et al., plaintiffs in error, vs. J. Downey Harvey, administrator, etc., defendant in error. Original citation. Filed Nov. 18, 1899. Geo. W. Root, clerk; by A. W. Johnson, deputy.

83 In the supreme court of the State of California.

J. DOWNEY HARVEY, ADM., ETC., RESPONDENT,
v.
JOSÉ QUEVAS ET AL., APPELLANTS. } L. A., 489.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of transcript, opinion of the court, judgment, assignment of errors, petition for writ, order allowing writ without bond, original writ, and original citation, pages 1 to 82, inc., the same constituting the papers on writ of error in the above-entitled cause as shown by the records of my office.

Witness my hand and the seal of the court this 18th day of November, A. D. 1899.

[SEAL.]

GEO. W. ROOT, *Clerk*,
By A. W. JOHNSON, *Chief Deputy*.

(Indorsed:) L. A., No. 489. In the supreme court, State of California. Harvey, adm., vs. Quevas et al.

84 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of California, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. Downey Harvey, administrator of the estate of John G. Downey, deceased, plaintiff, and Jesus Quevas, sometimes called Jesus Cuevo, named in the complaint herein as Henry Roe Quevas; José Quevas, sometimes called José Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; José Maria Quilpe, named in the complaint as John Green; Francisca Quilpe, named in the complaint as Mary Green; Maria Quilpe; Dolores Quevas, sometimes called Dolores Cuevo; Rufina Quevas, sometimes called Rufina Cuevo; Marcia Quevas, sometimes called Marcia Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; Maria Nacho, named in complaint herein as Sarah Green; Angel Quilpe; José Dolores Palawish, sometimes called Jose Dolores; José Felix, sometimes called Felix Wichonla; Madelina Palawish; Matilda Quevas, sometimes called Matilda Palawish; Jacobo Palawish, sometimes called Acovo Palawish; José Juan, sometimes called José Juan Palawish; Jacobo Dominga Palawish; Maria Antonia Guachona, sometimes called Maria Antonio
85 Wichonla; Maria Jesus Colol; Sebastian Palawish; Josefa Palawish; Josefa Guachona, sometimes called Josefa Wichonla; Maria

Los Angeles Palawish; Manuel Palawish, and Pelegrino Palawish, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Jesus Quevas, sometimes called Jesus Cuevo, named in complaint herein as Henry Roe Quevas; José Quevas, sometimes called Jose Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; José Maria Quilpe, named in complaint as John Green; Francisca Quilpe, named in complaint as Mary Green; Maria Quilpe; Dolores Quevas, sometimes called Dolores Cuevo; Rufina Quevas, sometimes called Rufina Cuevo; Marcia Quevas, sometimes called Marcia Cuevo; Antonio Quevas, sometimes called Antonio Cuevo; Maria Nacho, named in complaint herein as Sarah Green; Angel Quilpe; José Dolores Palawish, sometimes called José Dolores; José Felix, sometimes called

86 Felix Wichonla, Madelina Palawish, Matilda Quevas, sometimes called Matilda Palawish, Jacobo Palawish, sometimes called Acovo Palawish, José Juan, sometimes called José Juan Palawish, Jacobo Dominga Palawish, Maria Antonio Guachona, sometimes called Maria Antonio Wichonla, Maria Jesus Colol, Sebastian Palawish, Josefa Guachona, sometimes called Josefa Wichonla, Maria Los Angeles Palawish, Manuel Palawish, and Pelegrino Palawish, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller Chief Justice of the United States, the 17th day of January, in the year of our Lord, nineteen hundred.

[SEAL]

SOUTHARD HOFFMANN,
Clerk U. S. Circuit Court, Northern District of California.

87 The foregoing writ of error is hereby allowed; and the same having been directed to be taken by the Department of Justice of the United States; and the defendant in error having waived, in writing, all bond, and consented that writ of error may operate as a supersedeas:

It is hereby ordered that no bond be required for the prosecution of said writ and that the same operate as a supersedeas.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

88 (Indorsed:) L. A. No. 489. (Original.) Supreme Court State of California. Harvey, adm., vs. Quevas et al. Writ of error. Filed Jan. 10, 1900. Geo. W. Root, Clerk. By A. W. Johnson, deputy.

89 UNITED STATES OF AMERICA, ss.

To J. Downey Harvey, administrator of the estate of John G. Downey, deceased:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Jesus Quevas, sometimes called Jesus Cuevo, named in complaint herein as Henry Roe Quevas, José Quevas, sometimes called José Cuevo, Antonio Quevas, sometimes called Antonio Cuevo, José Maria Quilpe, named in complaint as John Green, Francisca Quilpe, named in complaint as Mary Green, Maria Quilpe, Dolores Quevas, sometimes called Dolores Cuevo, Rufina Quevas, sometimes called Rufina Cuevo, Marcia Quevas, sometimes called Marcia Cuevo, Antonio Quevas, sometimes called Antonio Cuevo, Maria Nacho, named in complaint herein as Sarah Green, Angel Quilpe, Jose Dolores Palawish, sometimes called José Dolores, Jose Felix, sometimes called Felix Wichonla, Madelina Palawish, Matilda Quevas, sometimes called Matilda Palawish, Jacobo Palawish, sometimes called Acovo Palawish, Jose Juan, sometimes called José Juan Palawish, Jacobo Dominga Palawish, Maria Antonia Guachona, sometimes called Maria Antonio Wichonla, Maria Jesus Colol, Sebastian Palawish, Josefa Guachona, sometimes called Josefa Wichonia, Maria Los Angeles Palawish, Manual Palawish, and Peledrino Palawish are plaintiffs in
90 error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this the 17th day of January, in the year of our Lord nineteen hundred.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

91 Receipt of a copy of the within and foregoing citation admitted this the 19 day of January, A. D. 1900.

WHITE & MONROE,
Attorneys for Defendant in Error.

Receipt of a copy of the within and foregoing citation admitted this the 20 day of January, A. D. 1900.

J. DOWNEY HARVEY,
Administrator of the Estate of John G. Downey, Deceased, Defendant in Error.

92 (Indorsed:) L. A. No. 489. (Original.) Supreme court, State of California. Harvey, adm., vs. Quevas et al. Citation. Filed Feb. 5, 1900. Geo. W. Root, clerk. By A. W. Johnson, deputy.

93 In the supreme court of the State of California.

J. DOWNEY HARVEY, ADM., ETC., RESPONDENT,
vs.
JOSÉ QUEVAS ET AL., APPELLANTS. } L. A. 489.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of transcript, opinion of the court, judgment, assignment of errors, petition for writ, order allowing writ without bond, original writ, and original citation, pages to inclusive, the same constituting the papers on writ of error in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 5th day of February, A. D. 1900.

[SEAL.]

GEO. W. ROOT, *Clerk.*
By A. W. JOHNSON, *Chief Deputy.*

(Indorsed:) L. A. No. 489. In the supreme court, State of California. Harvey vs. Quevas et al.

(Indorsement on cover:) File No. 17651. California supreme court. Term No. 537. Jesus Quevas, sometimes called Jesus Cuevo, et al., plaintiffs in error, vs. J. Downey Harvey, administrator of the estate of John G. Downey, deceased. Filed February 21st, 1900.

O

No. 209.

By Atty. Gen'l (Hoyt), for D.C.

Office Supreme Court U.S.
FILED
MAR 13 1901
JAMES H. McKENNEY,
Clerk.

Filed Mar. 13, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

ALLEJANDRO BARKER ET AL., PLAINTIFFS in error,
v.
J. DOWNEY HARVEY, ADMINISTRATOR OF the estate of John G. Downey, deceased, and the Merchants' Exchange Bank of San Francisco. } No. 209.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE PLAINTIFFS IN ERROR.

INDEX AND ANALYSIS OF BRIEF

Pages

Table of cases cited 4
Statement of case 5
Review of proceedings in the trial court 9
Points decided in the case under review, and the respect in which such decision is in conflict with *Byrne* v. *Alas* (74 Cal., 628), upon which defendants here rely as fixing the law in this case... 14
Defendants' points briefly stated 17
Argument 23
First. The possessory landed rights of Mission Indians were protected and preserved by the general laws of Mexico, and grants which included Indian settlements were subject to the continuing right of use and occupancy by the Indians, although silent on the subject 23
Second. In this case defendants' rights are preserved, both by the general laws of Mexico and by the very terms of the grants under which plaintiffs claim 26
The law of *Byrne* v. *Alas* (74 Cal., 628) stated 35
The scope, purpose, and effect of the act of Congress, March 3, 1851, entitled "An act to ascertain and settle private land claims in the State of California" 40
Third. That the law of *Byrne* v. *Alas* has not been overthrown by subsequent decisions as to the conclusiveness of patents based upon Mexican grants, or as to who constitute "third persons" not bound by proceedings had under the act of Congress of March 3, 1851 44
a. None of the cases cited by the court as overthrowing *Byrne* v. *Alas* holds that it was necessary to present to the land commissioners for confirmation claims of "third persons," as such term is used in the 15th section of the act of Congress of March 3, 1851 45
Analysis of authorities cited by the court 48
b. The Indians are not "mere strangers" to the title, but are "third persons" whose interests are not affected by the confirmation and patenting of Warner's claim; as their rights are prior and paramount to Warner's claim, and under the Mexican régime, a relation of trust and privity existed between the Indians holding the beneficial interest (the right to use and enjoy) and the grantee holding the bare legal title. That a trust as to title necessarily

17963—01——1

Argument—Continued. Pages.

exists, wherever the title stands in one party and the entire right to use and enjoy in another, and where such relation exists it is immaterial whether it is created by contract of the parties, by reservation in the grant, or by operation of law; the privity of estate thus existing does not depend upon the method or mode of its creation, but upon the essential characteristics of the relationship. 68

Authorities defining the meaning of the phrase "third persons" as used in the act of March 3, 1851, and showing the effect upon such of confirming and patenting Mexican grants..... 73

"Third persons," as the term is used by the act of March 3, 1851, were not required to present their claims to the Board of Land Commissioners for confirmation..... 82

Fourth. Concerning the court's holding that the report of the Mexican officials that the "Valle de San Jose" was "vacant and abandoned" distinguished this case from *Byrne* v. *Alas*, and operated as a conclusive adjudication that no Indians were in possession of the lands here in controversy, and thereafter precluded the contrary from being shown..... 86

a. This case can not be distinguished from *Byrne* v. *Alas* in so far as the report of the prefect that the lands were "vacant" is concerned..... 86

b. The words "vacant and abandoned" used in the report mentioned refer only to the occupancy of the recognized proprietor or owner—the San Diego Mission—and do not apply to Indian occupancy..... 87

c. But even if the words "vacant and abandoned" can be considered as referring to Indian occupancy, the report did not operate as an adjudication concluding the Indians, but merely as evidence, and is subject to be overcome, and has been overcome, by better evidence:..... 89

d. The evidence unmistakably shows that the tract of land to which such investigation and reports apply did not cover the tract in controversy here, and therefore can not be conclusive as to possession of these tracts..... 90

e. That plaintiff's title to the land here in controversy rests entirely upon the grant to Pico of the "Agua Caliente," which expressly preserved the rights of the Indians, and not upon the later grant to Warner..... 91

Fifth. There has never been any decision of the Land Commissioners or any other officers of the United States, holding either "in effect" or directly "that the land in question was vacant and subject to absolute alienation," so as to conclude the "third persons" referred to in the act of March 3, 1851; and had such commission and officers so held, such holding would not be binding upon "third persons," as such term is used in that act..... 111

Argument—Continued. Pages.

Sixth. Defendants' rights were preserved by virtue of the 16th section of the act of Congress of March 3, 1851, even though they were not such "third persons" as are protected by the terms of section 15 of such act 114

Seventh. The defendants have acquired a prescriptive right to the use of these lands 116

Eighth. This court should, upon the record before it, decide the entire controversy both as to the law and the facts 119

Conclusions 121

TABLE OF CASES, ETC., CITED.

	Pages.
Act of March 3, 1851 (9 Stats., 631)	6, 40, 82
Adam *v.* Norris, 103 U. S., 591	80
Anderson's Law Dictionary, 813	72
Apis *v.* United States, 88 Fed. Rep., 931, 939	24
Best on Evidence, vol. 2, p. 542	103
Botiller *v.* Dominguez, 130 U. S., 238	14, 37, 38, 46, 47, 49, 84
Beard *v.* Federy, 3 Wall., 478	46, 53
Byrne *v.* Alas, 74 Cal., 628	14, 35, 86
California Code of Civil Procedure, sec. 325	117, 118
Carpentier *v.* Montgomery, 13 Wall., 480	44
Cherokee Nation *v.* Georgia, 5 Pet., 1	34
Chouteau *v.* Molony, 16 How., 203	34
Christy *v.* Pridgeon, 4 Wall., 196	24
Coonradt *v.* Hill, 79 Cal., 593	118
De Guyer *v.* Banning, 167 U. S., 723	46, 62
Doolan *v.* Carr, 125 U. S., 618	77
Encyclopædia of Law, vol. 19, p. 156	72
Escriche's Spanish Law Dictionary	27
Frederick *v.* Dickey, 91 Cal., 358	118
Fulton *v.* Hanlow, 20 Cal., 480	44
Graff *v.* Castleman, 16 Am. Dec., 754	103
1 Greenleaf on Evidence, § 189	72
Hardy *v.* Harbin, 4 Sawy., 536	44
Hart *v.* Burnett, 15 Cal., 530	44, 76
Harvey *v.* Barker, 126 Cal., 262	14
Heilbron *v.* Water Ditch Co., 75 Cal., 117, 123	119
Hill on Trustees, page 197, star page 144	78
Houston *v.* San Francisco, 47 Fed. Rep., 337	46, 58
Knight *v.* U. S. Land Association, 142 U. S., 201	46, 54
Los Angeles F. & M. Co. *v.* Thompson, 117 Cal., 594	46, 63
Leese *v.* Clark, 20 Cal., 425	79
McGarrahan *v.* New Idria Mining Co., 49 Cal., 335	102
Meader *v.* Norton, 11 Wall., 442	44, 77
More *v.* Steinbach, 127 U. S., 80	46, 61
Nuevo Diccionario de la Lengua Castellana	27
Newhall *v.* Sanger, 92 U. S., 761	46, 62
Pico *v.* Warner, 73 Cal., 17	103
Phillips on Evidence, vol. 1, p. 473, note 130	103
Smith *v.* Cooley, 65 Cal., 49	116
Stacy *v.* Thrasher, 6 How., 44	72
Teschemacher *v.* Thompson, 18 Cal., 11	79
Townsend *v.* Greeley, 5 Wall., 335	44, 74
United States *v.* Castillero, 2 Bl., 17	46, 62
United States *v.* Morillo, 1 Wall., 706	78
Wilson *v.* Castro, 31 Cal., 420	44, 77

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

ALLEJANDRO BARKER ET AL., PLAINTIFFS in error,
v.
J. DOWNEY HARVEY, ADMINISTRATOR OF the estate of John G. Downey, deceased, and the Merchants' Exchange Bank of San Francisco. } No. 209.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Involving the possessory rights of Mission Indians on confirmed and patented Mexican grants in California as against the patentee—the Indians' claims never having been presented for confirmation to the Board of Land Commissioners created by the act of Congress of March 3, 1851.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is an action to quiet title to, and recover possession of, certain lands in San Diego County, Cal. The plaintiffs assert title to the lands in controversy, under and by virtue of a United States patent based upon two confirmed Mexican grants, such patent having been issued under and in pursuance of proceedings

had under the act of Congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

The defendants in possession claim to be Mission Indians, and that they have been in the possession, use, and occupancy of these lands ever since a time long prior to the date of the Mexican grants upon which plaintiffs' title is based, and that during all of such time they have claimed the right so to use, occupy, and possess such property as against all the world, without, however, the right to dispose of the same; and they claim that under and by virtue of the Spanish and Mexican law existing in the ceded territory prior to the transfer of sovereignty to the United States, Indians, such as these, were entitled for themselves and their descendants to the continued use and occupancy of the lands of which they were possessed and which they were using, so long as they or any of their descendants remained in such possession and use, without, however, having the power of alienation; and that all private grants of such lands made by the Mexican Government, were under the law subject to such general right of use and occupancy in the Indians, although the grants including such lands were silent upon this subject. Defendants further claim, however, that in the grant upon which plaintiffs' title rests, the defendants' right to continued use and occupancy of these lands was expressly preserved and protected; and they claim that, under and by virtue of the provisions of the treaty of Guadalupe Hidalgo between the

United States and the Government of Mexico, their usufructuary rights in these lands were preserved and protected.

Defendants never presented their claim to their usufructuary rights in these lands, to the Board of Land Commissioners, appointed under the act of Congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and it is their claim that they were relieved of the necessity of presenting their claims to such board, for the reason that the sole purpose of the act of Congress in question was to segregate private property from public domain, and to fix the boundaries of each, and that proceedings had, and patents issued thereunder, were binding upon the United States and the claimant only, and upon parties claiming under the United States by title subsequent to the change of sovereignty, but were not binding upon "third persons" claiming an interest in the lands by a right or title prior and paramount to that confirmed and patented. And defendants claim that the requirements of such law as to these lands were fully met and complied with, and such lands adjudged to be private property and not a part of the public domain, by the presentation to the Board of Land Commissioners of the claim of one Juan J. Warner therefor (plaintiffs' predecessor in interest, one of the original grantees from the Mexican Government), and by the confirmation and patenting of such claim; that this vested the legal title in Warner, and operated to relieve the defendants from the necessity of presenting their claims to such board, but did not change the

character or extent of Warner's claim or title, but the same remained, just as formerly, subject to the usufructuary rights of the defendants and charged with and subject to all of the lawful uses previously existing. That the defendants are "third persons" as such term is used in the fifteenth section of the statute in question, whose rights are not concluded by proceedings had thereunder; that as under the Mexican régime the grantee held the legal title in trust for the defendants, who were the beneficial owners entitled to the use and enjoyment of the lands, this relation of privity of estate and trust was not cut off or extinguished by confirmation and patent to the grantee Warner.

Defendants further claim, that they were wards of the Mexican nation, and by the transfer of sovereignty became, and ever since have been, wards of this nation, and that it was not intended that they should be compelled to present their claims to the Board of Land Commissioners for confirmation, under penalty of forfeiture for failure so to do.

Plaintiffs, on the other hand, claim that their patent from the United States is conclusive of the entire controversy, and that all evidence as to the defendants being Mission Indians, or as to their ancient and continued use, occupancy, and possession of these lands is immaterial and inadmissible, and all of such evidence was objected to on that ground. All testimony of defendants was introduced under such objections of plaintiffs and was permitted to be received, but such

objections thereto were subsequently—over three years after the cause had been submitted—sustained, and all of such testimony of defendants stricken out and judgment given for plaintiff, and defendants' motion for a new trial denied. This position has been sustained by the supreme court of California—Chief Justice Beatty and Justices McFarland and Temple dissenting—the majority of the court having held that the patent to plaintiffs' predecessor in interest was conclusive of the entire controversy, and that all claims of the defendants were lost by not being presented for confirmation to the Board of Land Commissioners appointed under the act of Congress above mentioned; and that defendants were not "third persons" whose rights were protected under the fifteenth section of such act of Congress, but were mere strangers to the title, and that all evidence as to the former property rights of such defendants and their ancestors under the Mexican law was therefore immaterial and inadmissible, and properly stricken out.

The entire issue between the parties in the courts below was one of law and not of fact. It was as to the materiality and admissibility of defendants' evidence, and not as to the sufficiency or weight thereof, and the questions involved might all have been raised upon demurrer to defendants' answer, but this was not done.

REVIEW OF PROCEEDINGS IN THE TRIAL COURT.

Instead of settling the law of the case, upon demurrer to defendants' answer, no demurrer was filed, and the cause came on to be heard upon the issues raised

in the complaint and answer in July, 1893, before Judge Puterbaugh. Plaintiffs introduced in evidence United States patent to J. J. Warner, dated January 16, 1880, for the Rancho San Jose del Valle. (See Tr., p. 20.) It was then stipulated that the lands described in said patent included the premises in controversy; that plaintiffs had succeeded to all the rights of the patentee, and had paid all taxes levied or assessed upon the premises in controversy since the patent issued. Whereupon plaintiffs rested. Thereupon, to show that the rights of the Indians in possession were reserved by the Mexican grants on which plaintiffs' patent was based, defendants offered in evidence the complete "expedientes" of the two grants from the Mexican Government, upon which such patent was based; the first grant being made June 8th, 1840, to Jose Antonio Pico by Juan B. Alvarado, governor of California, and the second being made November 28th, 1844, to Juan Jose Warner by Manuel Micheltoreno, governor-general of California. The grant to Pico includes all of the lands in controversy. (See Tr., p. 29), and provides that the grantee shall "not molest (prejudicar) the Indians that thereon may be established." (See Tr., p. 30.) The later grant to Warner provides that the grantee will be allowed to fence it "without interfering with the roads and other usages" (servidumbres). (See Tr., p. 26.) To the introduction of these expedientes plaintiffs objected on the ground that the same were incompetent, irrelevant, and immaterial; that the patent was conclusive as to the title of the patentee and his successors in interest,

and that the antecedent proceedings and documents referred to have no bearing, and can in no manner affect the validity of the patent or its adequacy as an instrument conveying title to the patentee. The court reserved its ruling upon such objection, and the expedientes were for the time being received, the court stating that an exception would be given to the party against whom the ruling might finally be made. (See Tr., p. 23 to 31.) Subsequently, nearly three and one-half years later (the case having been transferred to another judge—W. L. Pierce—after the evidence was all in), these objections were sustained and an exception given to defendants, which ruling defendants specify as error. (See Tr., p. 31.)

Defendants next offered in evidence petition of J. J. Warner, filed before the board of land commissioners above referred to in 1852, asking confirmation of his title to the lands in controversy, which petition states that it is based upon the two grants already mentioned. Upon this petition all subsequent proceedings for the confirmation of Warner's title and the ultimate issue of patent are based. This evidence was objected to on the same grounds as urged to the admission of the expedientes of the two grants, and the petition was filed and the ruling of the court reserved, and subsequently, three and a half years later, in December, 1896, such objection was sustained and an exception given to defendants (see Tr., pp. 31 and 32), which ruling defendants specify as error.

Defendants then offered certain depositions, and a

large amount of oral testimony, wherein the parties deposing or testifying stated that the defendants and their ancestors were Mission Indians; that they had formerly been under the charge of the San Luis Rey mission; that they had been in the exclusive use, occupancy, and possession of the premises in controversy continuously ever since a time long prior to the inception of plaintiffs' title from Mexico, and beyond the memory of man, and had always claimed and exercised the right so to use such property; that they had substantial houses and good improvements thereon, and lived there with their families and obtained their subsistence therefrom. To each of such depositions and to all such oral testimony plaintiffs interposed their objections as the same were offered, the objections being the same as to the documentary evidence already offered, viz, that the patent was conclusive, and all such evidence was therefore immaterial, as it could not vary, impair, qualify, or affect the rights of the patentee; and the depositions and testimony were permitted to go in, the court's rulings being reserved. Thereafter, upon December 29, 1896, nearly three and a half years later, such objections were all sustained and exceptions granted to defendants, each and all of which rulings defendants specify as error. Such depositions and evidence so held to be immaterial are set forth in transcript, pages 32 to 54.

Upon defendants resting, plaintiffs introduced certain evidence, with the understanding that if their objections to defendants' evidence was ultimately sus-

tained by the court the rebuttal was to be withdrawn. Such rebuttal evidence was confined to an attempt to show that plaintiffs' patent rested, not on the grant of 1840, but upon the grant of 1844, and to showing that during recent years plaintiffs' use for pasture purposes of a portion of the lands claimed by them had been somewhat restricted by defendants, and to proving that during recent years defendants had enlarged their area of cultivated lands.

In December, 1896, findings and judgment were given by the court in favor of plaintiffs, "*all of the objections interposed by plaintiffs to the evidence introduced by defendants having been sustained by the court and the sufficiency or effect of such evidence not being considered or regarded by the court in rendering its decision.*" (See Tr., p. 61.) This left no evidence for the defense before the court whatever, it all having been objected to and all objections sustained.

Defendants moved for a new trial upon the minutes of the court, and incorporated in their notice of intention to move for new trial their grounds of motion and a detailed designation of the errors of the court to be relied upon on such motion. (See notice of motion, Tr., p. 61 to 69.) This motion was denied by the court and appeal was taken to the supreme court of the State from the judgment and from such order denying defendants' motion for new trial.

The supreme court of California upon appeal, by a divided court, affirmed the judgment of the lower court, the opinion of the majority being written by Justice Van Dyke and concurred in by Justices Harrison,

Garoutte, and Henshaw, while Chief Justice Beatty and Justices McFarland and Temple dissented. (See opinion in transcript, pp. 70 to 81. See *Harvey* v. *Barker*, 126 Cal., 262.) Writ of error was prosecuted to this court, specifications of error being found on page 85 of the transcript. Defendants relied upon the law as stated in the case of *Byrne* v. *Alas* (74 Cal., 628), a case practically on all fours with this case, as being conclusive of the law in their favor. Plaintiffs relied upon the case of *Botiller* v. *Dominguez* (130 U. S., 238) as overruling *Byrne* v. *Alas*, and the court sustained the plaintiffs in this contention, and affirmed the decision of the trial court, and also held that the case was distinguished from *Byrne* v. *Alas* in that the later grant under which plaintiffs here claim, contains no language preserving the Indians' rights, and that defendants were estopped from showing they were in possession when that grant was made by certain reports of the Mexican officials that the lands were then vacant. In this brief we will first present briefly our views of the law, and will then review somewhat fully the reasoning and authorities relied upon by the majority of the California supreme court in this case as defeating our contention.

POINTS DECIDED IN THE CASE UNDER REVIEW; AND THE RESPECTS IN WHICH SUCH DECISION IS IN CONFLICT WITH BYRNE v. ALAS, 74 CAL., 628, UPON WHICH DEFENDANTS RELY AS FIXING THE LAW OF THIS CASE.

The following are the vital points in the decision sought to be reviewed, and the respects in which it impairs the law as announced in *Byrne* v. *Alas* (74

Cal., 628)—*the case upon which defendants here rely as fixing the law of this case, and as conclusive of this controversy.*

First. The law as to what were the landed rights of Mission Indians under the Spanish and Mexican régime, as laid down in *Byrne* v. *Alas*, is in no way impaired or controverted by the decision rendered in this case. Such law, therefore, still stands as the law of California, and in this brief we will assume that it remains unaffected, and that these defendants under the Spanish and Mexican law had the right for themselves and their descendants perpetually to possess, occupy, and use these lands, without, however, the power of alienation: provided they were in the possession, use, and occupancy thereof when the grants under which plaintiffs claim were made; and provided we are not precluded—by the patent or by the alleged report of the Mexican officials that they were vacant—from proving that the Indians were then in possession.

So much, therefore, of *Byrne* v. *Alas* is left in full force and effect as holds that under Spanish and Mexican law "whenever Indian settlements are established, and the Indians till the ground, they have the right of occupancy in the lands they need and use, and whenever a grant is made to include such settlements, the grant is subject to such occupancy."

Second. In the decision in this case it is held that we are not permitted to go behind a patent in a case like this.

So even though this case be conceded as on all fours with *Byrne* v. *Alas*, it will not avail the defendants

here, as the opinion under review holds that *Byrne* v. *Alas* "can no longer be considered as authority" upon this subject, as it is held to be in conflict with the subsequent decisions of the supreme court of California and of the United States courts as to the necessity of presenting *all* claims to the Board of Land Commissioners for confirmation; and contrary to the established law as to who constitute "third persons" under section 15 of the act of Congress of March 3, 1851 (9 Stat. L., 631), who are not bound by decrees and patents under such act.

Third. In the opinion under review, the present case is distinguished from *Byrne* v. *Alas* in the following respects, which are claimed to be material: (*a*) Here the investigation and report of the Mexican officials made in connection with the grant to Warner of the "Valle de San Jose" showed it was "vacant and abandoned" and could be granted; and this, the court holds, operated as a conclusive adjudication that no Indians were then in possession of the lands here in controversy, and precluded the contrary ever being thereafter shown. (*b*) Here the court states that under the grant to Warner in this case, which was confirmed and patented, "the clause in reference to the rights of Indians is entirely omitted," whereas in *Byrne* v. *Alas* the grant contained such a clause preserving the rights of Indians.

Fourth. Here it is decided that plaintiffs' title rests entirely upon the junior grant to Warner, and not upon the senior grant to Pico, which specifically reserves the Indians' rights, and that the word "servidumbres,"

used in the grant to Warner, was not equivalent to a clause preserving the rights of the Indians from prejudice.

Fifth. The court finally concludes in this case that "the decision of the Land Commissioners and other appropriate officers of the Government of the United States, holding to the effect that the land in question was at the time it was granted vacant and subject to absolute alienation, is conclusive on the defendants and all others."

The court being with us upon the first point above mentioned as to the former property rights of such Indians as these under the Spanish and Mexican law, and the decision of the California supreme court upon this question being binding upon this court, it is unnecessary for us to present authorities in this brief in support of that position.

DEFENDANTS' POINTS STATED.

First.

THE POSSESSORY LANDED RIGHTS OF MISSION INDIANS WERE PROTECTED AND PRESERVED BY THE GENERAL LAWS OF MEXICO, AND GRANTS WHICH INCLUDED INDIAN SETTLEMENTS, THOUGH SILENT ON THAT QUESTION, WERE SUBJECT TO THE CONTINUING RIGHTS OF USE AND OCCUPANCY IN THE INDIANS.

This is established by *Byrne* v. *Alas* (74 Cal., 628) and is not controverted by anything in the opinion under consideration, it only being held in such opinion that we are precluded from showing the fact of Indian

possession, from which such rights result. The decision of *Byrne* v. *Alas* on this subject, construing the law of Mexico formerly applicable to property rights in California, is binding upon this court just as the State court's construction of its own local statutes would be.

Second.

THE GRANTS UNDER WHICH PLAINTIFFS CLAIM ARE NOT SILENT, HOWEVER, AS TO THE DEFENDANTS' RIGHTS, BUT IN THE SENIOR GRANT TO PICO—WHICH DEFENDANTS MAINTAIN CONTROLS—IT IS PROVIDED THAT THE GRANTEE "SHALL NOT MOLEST (PREJUDICAR) THE INDIANS THAT THEREON MAY BE ESTABLISHED:" AND IN THE JUNIOR GRANT TO WARNER—WHICH PLAINTIFFS MAINTAIN CONTROLS—THE INDIANS' RIGHTS ARE PRESERVED BY THE PROVISION THAT THE GRANTEE SHALL NOT INTERFERE WITH THE "SERVIDUMBRES," WHICH DEFENDANTS CLAIM INCLUDED ALL EXISTING USAGES, EASEMENTS, AND SERVITUDES.

Third.

THAT THE LAW OF BYRNE V. ALAS HAS NOT BEEN OVERTHROWN BY SUBSEQUENT DECISIONS AS TO THE CONCLUSIVENESS OF PATENTS BASED UPON MEXICAN GRANTS, OR AS TO WHO CONSTITUTE "THIRD PERSONS" NOT BOUND BY PROCEEDINGS HAD UNDER THE ACT OF CONGRESS OF MARCH 3, 1851. (9 Stats. L., 631.)

And upon this subject we claim:

(*a*) That none of the decisions cited by the court in this case hold that it was necessary for "third persons"—as such term is used in the act of Congress of

March 3, 1851—to present their claims to the board of land commissioners, but such decisions refer alone to the necessity of presenting all claims *except those of "third persons."*

(*b*) "Third persons" are those persons whose rights are prior and paramount to the claim that was presented and confirmed, and who sustain some privity with, or trust relation to, such presented and confirmed claims; such third persons are not cut off by proceedings had under such act, but they can take advantage of and claim the benefit of such proceedings as were had thereunder. If no proceedings were had thereunder, there can of course be no "third person" not bound thereby.

The Indians' right of occupancy, under the former sovereignty, constituted him the beneficial owner of the property. The grant constituted the grantee the legal owner, who held the title in trust for the Indians, and subject and subordinate to the latter's equitable rights therein. That a trust as to title necessarily exists wherever the title stands in one party and the right to use and enjoy in another; and where such relation of trust and privity exists it is immaterial whether it is created by contract of the parties, by reservation in the grant, or by operation of law; the privity of estate thus existing does not depend upon the mode or method of its creation, but upon the essential characteristics of the relationship.

There was no essential antagonism or hostility between the grantee's and the Indians' title; they might and did coexist, without either being destructive of

the other. The use in one person, and the legal title in another, is entirely reconcilable, and exists wherever an easement, usufructuary right, or servitude exists. The case, therefore, is wholly different from that of two entirely independent grants, each purporting to vest complete, antagonistic, and irreconcilable titles, so that the confirmation and patenting of one could not inure to the advantage of the other—there being no trust relation or privity between them.

We therefore insist that as the Indians' rights in the property under the former sovereignty were prior and paramount to the rights of the grantee, and as there was a relation of trust and privity between the Indians, having the right to use, and the grantee, having the right to dispose of the property, that the Indians are in the fullest sense of the term "third persons" under the 15th section of the act of Congress of March 3, 1851; that their rights were not prejudiced nor cut off by their failure to present their claims to the Board of Land Commissioners, and that the presentation, confirmation, and patenting of the grants to Warner segregated these lands from the public domain and satisfied the requirements of the statute and inured to the benefit of the Indians and operated to vest in Warner the legal title, subject, just as it was before the change of sovereignty, to the continued right of use and occupancy in the Indians.

Fourth.

CONCERNING THE COURT'S HOLDING, THAT THE REPORT OF THE MEXICAN OFFICIALS THAT THE "VALLE DE SAN JOSE" WAS "VACANT AND ABANDONED" DISTINGUISHED THIS CASE FROM BYRNE V. ALAS, AND OPERATED AS A CONCLUSIVE ADJUDICATION THAT NO INDIANS WERE IN POSSESSION OF THE LANDS HERE IN CONTROVERSY AND THEREAFTER PRECLUDED THE CONTRARY FROM BEING SHOWN.

Our points are:

(*a*) This case can not be distinguished from *Byrne* v. *Alas*, in so far as the report of the prefect that the lands were "vacant" is concerned; as the report of the prefect in *Byrne* v. *Alas* did likewise.

(*b*) The words "vacant and abandoned" used in the report of the prefect refer only to the occupancy of the recognized proprietor—the San Diego Mission—and do not apply to Indian occupation.

(*c*) Even if the words "vacant and abandoned" could be considered as referring to the Indians' occupancy, the report did not operate as an adjudication, concluding the Indians, but is only in the nature of evidence, and subject to be overcome, and has been overcome, by better evidence.

(*d*) The evidence unmistakably shows that the tract of land to which such investigation and reports applied did not cover the tracts in controversy here, and, therefore, can not be conclusive as to the possession of these tracts.

(e) On this subject we maintain that plaintiffs' title as to the land here in controversy rests entirely upon the senior grant to Pico, which expressly preserves the rights of the Indians, and has no recital that the lands are vacant.

Fifth.

THAT THERE HAS NEVER BEEN ANY DECISION OF THE LAND COMMISSIONERS OR OF ANY OTHER OFFICERS OF THE UNITED STATES, EITHER "IN EFFECT" OR DIRECTLY, "THAT THE LAND IN QUESTION WAS VACANT AND SUBJECT TO ABSOLUTE ALIENATION" SO AS TO CONCLUDE THE THIRD PERSONS REFERRED TO IN THE ACT OF MARCH 3, 1851; AND, THAT HAD SUCH COMMISSIONERS AND OFFICERS SO HELD, IT WOULD NOT BE BINDING UPON "THIRD PERSONS" AS SUCH TERM IS USED IN THAT ACT.

Sixth.

DEFENDANTS' RIGHTS WERE PRESERVED BY VIRTUE OF THE 16TH SECTION OF THE ACT OF CONGRESS OF MARCH 3, 1851, EVEN THOUGH THEY WERE NOT SUCH "THIRD PERSONS" AS ARE PROTECTED BY THE TERMS OF SECTION 15 OF SUCH ACT.

Seventh.

THE DEFENDANTS HAVE ACQUIRED A PRESCRIPTIVE RIGHT TO THE USE OF THESE LANDS.

Eighth.

THIS COURT SHOULD, UPON THE RECORD BEFORE IT, DECIDE THE ENTIRE CONTROVERSY, BOTH AS TO THE LAW AND THE FACTS.

In support of these several points of the defendants, we submit the following argument:

ARGUMENT.

First.

THE POSSESSORY LANDED RIGHTS OF MISSION INDIANS WERE PROTECTED AND PRESERVED BY THE GENERAL LAWS OF MEXICO, AND GRANTS WHICH INCLUDED INDIAN SETTLEMENTS WERE SUBJECT TO THE CONTINUING RIGHT OF USE AND OCCUPANCY IN THE INDIANS, THOUGH SILENT ON THE SUBJECT.

Under the Mexican law existing in California at the time of the inception of the plaintiffs' rights by grant from the Mexican Government and up to the transfer of sovereignty to the United States, Indians, such as the defendants here, had the right to occupy and use such public lands as they were occupying and needed; and whenever a grant was made which included an Indian settlement, the grant was subject to the continuing right of use and occupancy in the Indians; that is to say, the grantee by his grant acquired the fee burdened with and subject to the continuing servitude of Indian use and occupancy—the legal title being in the grantee, the beneficial title (with no power of alienation) in the Indians, subject to extinguishment only by abandonment on the part of the Indians, whereupon the beneficial title was swallowed up and merged in the fee. Such was decided by the supreme court of California in *Byrne* v. *Alas* (74 Cal., 628) to be the law applicable to the rights of Mission Indians upon Mexican grants in California.

The correctness of the doctrine there established has never been questioned in any subsequent decision of that court, nor even in this case; and such decision is the law of California on the subject to-day, and is binding not only upon the courts of that State, but also upon the Supreme Court of the United States. See the case of *Christy* v. *Pridgeon* (4 Wall., 196), which holds that the interpretation placed by the highest State court upon Mexican law formerly applicable to lands within such State is binding upon the United States Supreme Court, just as though such law were a local statute of such State, no matter what the United States Supreme Court might think of the original soundness of such interpretation of the law. That the case of *Byrne* v. *Alas* did establish the rights of Indians under the Mexican law, and that such decision is binding upon the Federal courts, see *Apis* v. *United States* (88 Fed. Rep., 931–939). There, in referring to the rights of Mission Indians to the use and occupancy of lands under the Mexican law, the court says "That the Indians here thus occupying the land in 1845, then had, and now have, valid rights, has been settled by the supreme court of California (*Byrne* v. *Alas*, 74 Cal., 628; 16 Pacific, 523): and its interpretation of the law is binding upon the Federal courts (*Christy* v. *Pridgeon*, 4 Wall., 196)."

The doctrine that the State court's established interpretation of its own local statutes, is binding upon the United States Supreme Court, is too well established to require a citation of authorities. The conclusions

reached by the California supreme court in *Byrne* v. *Alas* as to the landed rights of the Mission Indians under the Mexican law, is in accordance with the great weight of authority, and is supported by sound and convincing reasoning; but its soundness is not open to question, or subject to debate in this proceeding. *It is final*, and establishes the law on this subject in California and constitutes every grantee of a Mexican grant, covering a Mission Indian settlement, the owner of the legal title, burdened with a prior and continuing beneficial use in the Indians. *Byrne* v. *Alas* fixes the nature of the Indian title, and holds it to be prior and paramount to the grantee's title; and throughout the argument of this case this status of the Indian title under the former sovereignty must be conceded and should be borne in mind; to our mind it is determinative of the whole case, for fixing, as it does, the possessory rights of the Indians under the Mexican systems to have been *valid, lawful rights*, and establishing them to be *prior and paramount to the rights of a subsequent grantee* from the Mexican Government, it necessarily follows that *their rights are such as are not concluded or cut off or extinguished* by proceedings and patent under the act of Congress of March 3, 1851.

So much of the case of *Byrne* v. *Alas as determines the nature and extent* of the Indians' landed rights under the Mexican law is not affected or changed by the decision of the supreme court of California in this case. But so much of the decision in *Byrne* v. *Alas* as held that a United States patent based upon a confirmed

Mexican grant is not conclusive as against Mission Indians who were occupying the lands when the grant in question was made, and who never presented their claim to the Board of Land Commissioners for confirmation, was distinctly reversed and overruled by the decision of the court in this case.

Second.

THE GRANTS UNDER WHICH PLAINTIFFS CLAIM ARE NOT SILENT, HOWEVER, AS TO THE DEFENDANTS' RIGHTS, BUT IN THE SENIOR GRANT TO PICO—WHICH DEFENDANTS MAINTAIN CONTROLS—IT IS PROVIDED THAT THE GRANTEE "SHALL NOT MOLEST (PREJUDICAR) THE INDIANS THAT THEREON MAY BE ESTABLISHED;" AND IN THE JUNIOR GRANT TO WARNER—WHICH PLAINTIFFS MAINTAIN CONTROLS—THE INDIANS' RIGHTS ARE PRESERVED BY THE PROVISION THAT THE GRANTEE SHALL NOT INTERFERE WITH THE "SERVIDUMBRES," WHICH DEFENDANTS CLAIM INCLUDED ALL EXISTING USAGES, EASEMENTS, AND SERVITUDES.

IN THIS CASE DEFENDANTS' RIGHTS ARE PRESERVED BOTH BY THE GENERAL LAWS OF MEXICO AND BY THE VERY TERMS OF THE GRANTS UNDER WHICH PLAINTIFFS CLAIM.

That defendants' rights are established and preserved by the general laws of Mexico, *Byrne* v. *Alas* conclusively shows. But defendants do not rely alone upon the general laws of Mexico as preserving their possessory rights and reserving them from grants made by the Mexican Government, but they rely also upon the specific language of the grants under which plaintiffs claim, the first of which grants provides that the

grantee "shall not molest (*prejudicar*) the Indians that thereon may be established" (Tr., pp. 29 and 30): but if the plaintiffs' title is not based upon said first grant, but is based upon the second, then defendants maintain that the second of these grants, viz, the grant of 1844, by its general terms providing that the grantee shall not interfere with the "roads and other usages" ("*servidumbres*") (Tr., p. 26), preserved all the rights of the Indians thereon, and makes such grant subject to the rights of such Indians as fully as if their rights had by name been reserved. The Spanish word "*servidumbres*" is sufficiently comprehensive to embrace all that is included in our words easements, servitudes, and usufructs. This word is defined as follows by the Nuevo Diccionario de la Lengua Castellana (the standard unabridged Spanish authority corresponding with our Webster or Worcester): "Servidumbre: *el derecho ó uso que una cosa ó heredad tiene sobre otra, ó alguno sobre cosa ajena para provecho suyo ó en utilidad pública.*" The translation of which is: "The right or use which one thing, or real property (*heredad*), has over another, or which one thing has over a different thing for its own benefit, or in a public use."

Escriche's standard Spanish law dictionary, under the head of "Servidumbre," states that servitudes are divided into real and personal; the definition above given is of a *servidumbre real.* A *servidumbre personal* he then defines as follows: "La que está constituida en el predio á favor de una persona y no de otro predio, rústico ó urbano, en favor de una persona distinta

del propietario. Hay tres especies de esta servidumbre, a saber, el usufructo, el uso, y la habitación;" the translation of which is, "That (right) which results from realty in favor of a person, and not of other realty, or the right imposed on realty, country or city, in favor of some other than the proprietor. There are three kinds of this servitude, viz, the usufruct, the use, and the habitation." Escriche thus defines the "usufruct" as follows: "El derecho de Usar y gozar de las cosas, esto de aprovecharse de todas sus frutos dejando salve é ilesa la sustancia de ellas. La propiedad se compone de derecho de gozar y del de disponer de la cosa. Separados esto derechos, el de gozar se llymo usufructo, y el de disponer nuda propiedad;" the translation of which is, "The right to use and enjoy things of others (cosa agenas): that is, to utilize all their fruits, leaving safe and harmless the things themselves. The property is composed of the right to enjoy, and to dispose of the thing. Separating these rights, that to enjoy is called *usufruct*, and that to dispose of, the *bare property* (nuda propiedad)." From these definitions it is apparent that the word "*servidumbres*," as used in the grant to Warner, includes what is meant by our English word *servitudes*, *easements*, and *usufructs*. That the Indian right of use and occupancy under the Mexican law constituted a servitude upon the land, and a usufruct and easement in the land, there can be no doubt under the authorities: therefore we contend that the reservation of the existing "*servidumbres*" operated as a reservation of the Indian right

of use and occupancy, and that such purpose is just as effectually accomplished by the use of such term as though the grant had reserved "the rights of the Indians" in so many words. This reservation of the "*servidumbres*" we understand occurs in all Mexican grants in California, and shows plainly that it was the policy of the Mexican Government in making grants to preserve all existing servitudes, easements, and usufructs.

As already announced, counsel for plaintiffs maintain that they acquired title *solely through the junior grant* of 1844 above referred to, and that therefore the language of the senior grant, providing that the grantee shall "not molest (*prejudicar*) the Indians that thereon may be established" (Tr., pp. 29 and 30), can not be used in preservation of the defendants' rights in this suit.

An examination of the patent itself (Tr., p. 21) clearly shows that the same is based upon both grants, and as the land in question was included within the senior grant, the language of which specially, by name, reserves the rights of the Indians, *that grant* is conclusive in this case. But even if not conclusive, and even if it should be held that plaintiffs' rights were dependent entirely upon the junior grant—as plaintiffs claim—we maintain that the word "*servidumbres*," as above defined, is ample to protect the rights of the defendants. But we do not wish it understood for a moment that we consider the reservation, contained in either of such grants, as essential to the maintenance of defendants' rights.

Our argument as to the meaning of the Spanish word "servidumbres"—made before the supreme court of California substantially as above set forth—the majority opinion of that court disposes of in the following language: "It is useless for counsel on behalf of appellants to contend that the Warner grant is the same as the Pico grant in reference to the rights of Indians. Not to interfere with roads and other usages (*servidumbres*) under the circumstances, can not be tortured into the equivalent of a reservation in the grant to 'not molest (*prejudicar*) the Indians that thereon may be established.'"

Without either reason or authority our construction placed upon this word "*servidumbres*" is rejected as a "'ortured" construction.

If by merely quoting the definition of this much-used Spanish word, as given by the best recognized lexicographer in the Spanish language, and as expounded by the leading Spanish law writer of the age—where it is shown to be inclusive of all usufructuary rights in, and servitudes upon lands—we are subjected to the charge of "torturing" language, then we submit that the indictment should be found against those, who through the centuries have been molding and giving form and meaning to the Spanish language, rather than to one who has taken the liberty of referring to such recognized sources of authority, utterly oblivious of the fact that such a course could be considered "torturing."

Until the Spanish authorities above quoted are shown

to be incorrect or not trustworthy, or until it is shown that other equally good authorities hold that the word "servidumbres" does not include all usufructs and easements in and servitudes upon land, or until it is made clear that the possessory rights of such Indians as these did not, under the Spanish and Mexican law, constitute usufructory rights in or servitudes upon land—which was not even attempted in the opinion under review—we trust we will be pardoned if we deem it our duty to try and solve the meaning of this important word by such lights as the recognized authorities afford. If our authorities can not be refuted by equally good authority, our argument can hardly be disposed of in accordance with recognized judicial methods, merely by alleging our construction to be "tortured." As already stated, we maintain that under the Spanish and Mexican régime, the possessory rights of Indians such as these, were by force of the general law preserved as against the grantee of the legal title, without the necessity of a special or general reservation in the grant to that effect.

This is established by the many authorities quoted in *Byrne* v. *Alas*, and by the conclusion the court reached in that case; and we do not understand such position to be controverted by the decision in this case. This branch of the subject was disposed of by the court in this case as follows:

"Any argument based on the asserted rights of the Mission or Pueblo Indians under the Spanish or Mexican régime—and much of the argument on the part of

the appellants is on that line—is entirely irrelevant in this case, *as the grant under consideration did not interfere with any such alleged rights*," the theory being that it having been conclusively established by the report of the prefect that the land was "vacant and abandoned," it followed that there were no Indians thereon, and hence, of course, the grant "did not interfere with any such alleged rights," as, there being no possession, there were no rights.

Later in this brief we will show, as we believe, that such report of the prefect was not only not conclusive as to the Indian possession of the lands here involved, but that it did not even *apply* to such lands; and if we do, then the argument as to the landed rights of such Indians as these, under the general laws of Spain and Mexico, is not only relevant, but all-important, for the reason that if under the general laws of Spain and Mexico the rights of such Indians to possess, use, and occupy lands of which they were possessed, was preserved without the necessity of a special or general clause to that effect in the grants, then we submit that it is entirely unimportant whether the grants themselves, by special or general language, preserved such rights or not, and therefore in this case it is unimportant whether plaintiffs claim under the Pico grant, which specifically protects the Indians' rights, or under the Warner grant, which only protects them by the use of the word "servidumbres;" and even the meaning of the term "servidumbres" becomes unimportant. Therefore, as there is nothing in the opinion in this case in

any way controverting the doctrine of *Byrne* v. *Alas* that the possessory rights of such Indians were preserved by the general laws of Spain and Mexico without the necessity of any clause to that effect in grants of lands to individuals, we are not called upon to reinforce the doctrine as there stated.

It is our claim that the Indian rights, as they existed under the general laws of Mexico, were in no way increased, protected, or strengthened by the use in the grants of special language reserving the Indians' rights. Such language *amounted only to an official announcement of what the law on the subject was; it was merely the embodying of the general law of the land into the grant itself.* While in the absence of a law preserving the rights of the Indians, such a clause in the grant would undoubtedly have been effective to prevent their removal; *yet as the law of itself preserved such rights, it became unnecessary for the grant in so many words to do so.* It would have made no difference in the decision of *Byrne* v. *Alas* had the grant been entirely silent as to the Indians; the reservation was a mere circumstance in confirmation of the general doctrine as to what the court announces to have been the rights of such Indians under the Mexican law. Where the fact of Indian occupancy was specially called to the attention of the governor in the proceedings leading up to the grant, it was customary to insert the clause reserving their rights. This was merely done in the abundance of caution that the grantee might have full knowledge of the Indians' rights, but added no new

strength to their rights as established by the general law. In this respect the grant bears a close analogy to the United States patents based on Mexican grants, every one of which contains the clause that it shall not "affect the interests of third persons." This language adds nothing in the way of preserving the rights of "third persons," and operates only as a formal embodiment in the patent of the law on the subject, as contained in section 15 of the act of March 3, 1851. The rights of such "third persons" would be equally unaffected, even if the patent were silent on the subject; nor does the fact that it is customary to insert such clause make it necessary. It is merely inserted *so that upon its face it may be seen* that it is not conclusive as to the rights of third persons.

The many authorities quoted in *Byrne* v. *Alas* fully sustain the conclusion reached by the court as to the possessory rights of the Indians under the Spanish and Mexican laws, but in corroboration of such doctrine we submit the following additional authorities: *Cherokee Nation* v. *State of Georgia* (5 Peters, 1); *Chouteau* v. *Molony* (16 Howard, 203).

To appreciate the extent to which the opinion under review is in conflict with the law on the subject, as it had been previously determined to be in California, it is important that the court should understand exactly what was determined by the old case of *Byrne* v. *Alas*, which was upon all fours with the present case, and we will briefly state the facts in that case and what was there decided.

The law of Byrne v. Alas (74 Cal., 628).

This was an action of ejectment brought by the plaintiff, Byrne, to eject a large number of Mission Indians from a portion of the San Jacinto rancho in San Diego County, Cal., a confirmed and patented Mexican grant. The case was submitted to the lower court upon an agreed statement of facts, wherein it was admitted that the premises in controversy were within the exterior boundaries of a confirmed and patented Mexican grant, and that plaintiff held legal title thereto as successor in interest of the patentee from the United States Government; that the defendants were Mission Indians, and that their ancestors and predecessors had been in the exclusive possession, occupancy, and use of the premises, claiming adversely to all the world ever since the year 1815, and that they had never presented their claims to the land in controversy to the board of land commissioners, appointed by the act of Congress passed March 3, 1851, entitled "An act to ascertain and settle the private-land claims in the State of California." All defense of the statute of limitations was waived on behalf of the defendants.

The court was first called upon to ascertain what were the rights of such Indians to the soil under the laws of Mexico existing prior to the transfer of sovereignty, and, after reviewing the authorities on the subject, concludes that *wherever Indian settlements are established, either at the missions themselves or upon the large mission ranchos, they have a right of occupancy in the land they need and use, and whenever a grant is made*

which includes such settlements the grant is subject to such right of occupancy.

After determining, as above outlined, what were such property rights of Indians under the former sovereignty, the court, in *Byrne* v. *Alas*, next enters upon the inquiry as to what effect the confirmation of the Mexican grant, and the issue of the patent therefor, had upon the claims of the defendants, and in that connection inquires into the effect of the defendants' failure to present their claims to the board of land commissioners for confirmation and reaches the following conclusion, viz:

That as the fifteenth section of the act of Congress of March 3, 1851, provided that the decrees and patents issued under the act "shall be conclusive between the United States and claimants only, and shall not affect the interests of third persons," the rights of the Indians were thereby preserved without their claims being presented to the Board of Land Commissioners; that the patentee merely took the *legal* title in fee, subject to the Indian right of occupancy, and that all rights of the Indians and their ancestors existing before the change of sovereignty were preserved to them, *and that the confirmation of the grant to Estudillo* (the grantee from the Mexican Government) *was also a confirmation of the Indians' rights.* Estudillo merely took the legal title, and by the confirmation and patent he became a trustee for the defendants as to all rights in the property which they or their ancestors had at the time of the treaty of Guadalupe Hidalgo; and if the Indians

were entitled to possession before confirmation and patent, they were entitled to it afterwards, so long as any of the community remained in actual possession.

The court gives three reasons why the defendants were not required to present their claims to the Board of Land Commissioners, only one of which has been at all affected by the case of *Botiller* v. *Dominguez* (130 U. S., 238), or any of the other cases, upon which counsel and the lower court in this case rely as overthrowing the law of *Byrne* v. *Alas*.

The *first* reason given is, that as the act of March 3, 1851, only contemplated the segregation of private property from public domain,—and not the fixing of the respective rights of private claimants between themselves,—the presentation and confirmation of the claim of Estudillo (the Mexican grantee) operated as a presentation and confirmation of the rights of the Indians, and consequently relieved them from the necessity of such presentation. By the presentation and confirmation of Estudillo's claim, the property in controversy having been determined to be private property and not public domain, the object of the act of March 3, 1851, was fully accomplished, and no question of forfeiture of rights for nonpresentation could thereafter arise. The United States could no longer set up claim to any lands covered by such confirmation, and the only questions thereafter remaining to be determined were, what rights were acquired by the party obtaining confirmation and patent as against "third persons."

The court says: "The lands claimed by these

defendants are within the boundaries of a Mexican grant confirmed by the Board of Land Commissioners to Estudillo, it is true; but, as we have seen, *this confirmation relieved the defendants of the necessity of presenting their claims, and conclusively adjudicated the fact that the lands were private property and no portion of the public domain.*"

This reasoning applies with equal force to the defendants now at bar, and has been in no way affected or overruled by the decision of the United States Supreme Court in the case of *Botiller* v. *Dominguez.*

The *second* reason given by the court in *Byrne* v. *Alas*, why the defendants in that case were not called upon to present their claims to the Board of Land Commissioners was, "That nothing remained for them to do under the laws of Spain and Mexico to complete their right of possession. Neither was there any act or writing required on the part of the Government. *Their right was therefore complete.*"

It is apparent that in advancing this reason the court was relying upon what then seemed to be the law, viz, that it was only necessary to present to the Board of Land Commissioners *inchoate* and *incomplete* titles. There can be no doubt that this is no longer the law, as it has been changed and overruled by the United States Supreme Court in *Botiller* v. *Dominguez* above referred to, and if we were compelled to rely upon this rule alone to relieve defendants in the case at bar from presenting their claims to the Board of Land Commissioners for confirmation we would fail.

The *third* reason given by the court in *Byrne* v. *Alas*, why defendants were not called upon to present their claims to the Board of Land Commissioners for confirmation was, that section 16 of the act of March 3, 1851, provides "That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians and those who are engaged in agriculture or labor of any kind; also, those which are occupied and cultivated by Pueblo or Rancheros Indians." This language the court held indicated that Congress did not intend that the rights of the Indians should be cut off by a failure on their part to present their claims, but that it should be the duty of the commissioners to ascertain and report the tenure by which they held their lands, and for that reason Indian claims were not affected by such act.

The court in closing its decision concludes *that, as the rights of the Indians were valid rights, existing at the date of the treaty of Guadalupe Hidalgo, the patent to Estudillo was conclusive only as between the United States and the grantee; and that in view of the nature of the Indians' claims and the time when their rights attached, they are third persons within the meaning of section 15 of the act of March 3, 1851, and that, therefore, the legal title secured to Estudillo and his grantees, by virtue of the confirmation and patent, must be held by them charged with the right of occupancy by the Indians.*

The opinion in this case rejects the last conclusion of

Byrne v. *Alas*, and holds that Indians are not "third persons" within the meaning of that term, as used in the 15th section of the act of March 3, 1851, and therefore they are concluded by the patent under which plaintiffs claim.

We submit that the conclusion reached in *Byrne* v. *Alas*—except in the one particular above conceded—was sound and in accordance with the authorities, and that the conclusion to the contrary reached by the court in this case can not be sustained, and the major portion of this brief will be given to establishing this position.

THE SCOPE, PURPOSE, AND EFFECT OF THE ACT OF CONGRESS OF MARCH 3, 1851, ENTITLED "AN ACT TO ASCERTAIN AND SETTLE THE PRIVATE LAND CLAIMS IN THE STATE OF CALIFORNIA." (9 Stat. L., 631.)

The portions of the act of March 3, 1851, material to this controversy are as follows:

Section 1: "For the purpose of ascertaining and settling private land claims in the State of California a commission shall be, and is hereby, constituted, which shall consist of three commissioners," etc.

Section 8 provides "that each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims," etc., and it is made the duty of such commission to hear such

claims and decide thereon and to certify its conclusions to the district court; and appropriate appellate procedure is provided for taking the cases to the United States district and United States Supreme Court.

Section 13 of the act provides that "all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act shall be deemed held and considered as part of the public domain of the United States."

Section 15 is as follows: "That the final decrees rendered by the said commissioners, or by the district or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive *between the United States and said claimants only, and shall not affect the interests of third persons.*"

Section 16 is as follows: "That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the Mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians."

The authorities, both State and Federal, clearly show that the purpose of this act was merely to furnish a means for ascertaining the boundaries of private property, and of segregating the same from the public domain, and to relinquish all claim of the United States thereto; and that *its purpose was not the adjustment as between individuals of their private or conflicting property*

rights; and that when, by proceedings under such act, private property was segregated from the public domain, and the title and boundaries thereof confirmed, such confirmation—even when followed by subsequent patent—did not affect the rights of "third persons" therein, whose rights had their inception prior to the change of sovereignty.

The treaty of Guadalupe Hidalgo, entered into between Mexico and the United States, covering the territory embraced within the State of California, and made at the time of the transfer of sovereignty over such territory, guaranteed the protection by the latter nation of all private property interests existing under the laws of the former sovereignty. In order that some uniform and definite method of making this guaranty effective might be adopted, the first session of Congress held after the formal ratification of such treaty passed the act under consideration. This act provided the only method which this Government would recognize whereby private property in California could be segregated from the public domain. This was the sole object of such act. Neither the decree of the Board of Land Commissioners provided for by such act, nor the issuance of patent in pursuance of such decree, purported to settle the private property rights of individuals among themselves; but such decree and patent merely operated to determine the property rights as between the Government and the party presenting the claim, and all parties claiming under the Government by title subsequent. Such decree and patent did

not cut off the equities of parties as between themselves, acquired under title prior to the transfer of sovereignty. A patent based on such decree only operated as a quitclaim of the United States, and is construed only as an evidence that the legal title had passed by the grant from the former Government, or that such equities had existed under that Government in favor of the grantee as to require or justify relinquishment of the title upon the part of this Government.

Rights or equities as between the patentee and equitable claimants under the Mexican system, were not affected, nor in any way prejudiced by such patents. *Such confirmation and patent inured to the benefit of the confirmee and patentee so far as the legal title only was concerned, but determined nothing as to the equitable relations or privity of estate between the patentee and other parties holding prior and paramount equitable interests in the property under the laws of Mexico.*

And this was true, notwithstanding the fact that the holders of such equitable interests in the property had notice of the proceedings taken by the confirmee or patentee to obtain patent from the United States, and yet did not intervene to protect their rights. Such knowledge and failure to act upon the part of such claimants did not destroy their equities, nor relieve the legal title in the hands of the patentee or his successor from its trust character. This Government having decided, by the confirming and patenting of a given claim, that the property thereby confirmed and patented was private property and not a part of the

public domain, it had thereby complied with the duties devolving upon it by the treaty of Guadalupe Hidalgo, and the object of the act of March 3, 1851, was thereby accomplished.

The foregoing propositions are all fully sustained by the following cases, among others, viz:

Wilson v. *Castro* (31 Cal., 420).
Hart v. *Burnett* (15 Cal., 530).
Fulton v. *Hanlow* (20 Cal., 450).
Hardy v. *Harbin* (4 Sawyer, 536).
Townsend v. *Greeley* (5 Wall., 326).
Meader v. *Norton* (11 Wall., 442).
Carpentier v. *Montgomery* (13 Wall., 480).
Byrne v. *Alas* (74 Cal., 628).

And even the language of *Botiller* v. *Dominguez* (130 U. S., 238), relied upon by plaintiffs, concedes this to be the purpose of the act.

Third.

THAT THE LAW OF BYRNE v. ALAS HAS NOT BEEN BY SUBSEQUENT DECISIONS OVERTHROWN, AS TO THE CONCLUSIVENESS OF PATENTS BASED UPON MEXICAN GRANTS, OR AS TO WHO CONSTITUTE "THIRD PERSONS" NOT BOUND BY PROCEEDINGS HAD UNDER THE ACT OF CONGRESS OF MARCH 3, 1851. (9 STAT. L., 631.)

The holding of the court is that "we are not permitted to go behind the patent in a case like this," so even if this case can be conceded to be identical with *Byrne* v. *Alas*, it is held that this will not avail the defendants here, as the doctrines laid down in *Byrne* v. *Alas* as to the consequences of nonpresentation of

claims to the board of land commissioners and as to the scope and effect of patents based on presented claims, and as to who are third persons not concluded by such patents have subsequently been overthrown by the cases in the United States courts and in the supreme court of California.

In response to this position of the court, we make the following points:

(*a*) **NONE OF THE CASES CITED BY THE COURT AS OVERTHROWING BYRNE v. ALAS, HOLD THAT IT WAS NECESSARY TO PRESENT TO THE LAND COMMISSIONERS, FOR CONFIRMATION, CLAIMS OF "THIRD PERSONS," AS SUCH TERM IS USED IN THE FIFTEENTH SECTION OF THE ACT OF CONGRESS OF MARCH 3, 1851.**

In so far as they hold that "all claims" other than those of "third persons" must be presented, we are in full accord with them, and throughout our entire argument have freely admitted that *Byrne* v. *Alas*—in so far as it holds that it was unnecessary to present "*perfect claims*" to the board—has been overruled by the subsequent United States Supreme Court cases.

We submit that the cases cited in no way overrule *Byrne* v. *Alas* as to the "scope and effect of patents" based on confirmed Mexican grants, nor do they impair the law of *Byrne* v. *Alas* as to who constitute "third persons" whose interests are not affected by confirmation and patent of Mexican grants.

In arriving at its conclusions, the court quotes from cases which contain language stating in substance that "*all claims* for lands in California by virtue of any right

or title derived from the Spanish or Mexican Government must be presented to the board of land commissioners for confirmation." This language—"all claims" or "every claim"—is then construed by the court in its most sweeping sense, leaving out of consideration the fifteenth section of the act which preserved the rights of "third persons;" and it is then argued that as the Indians' "right or title" is "derived from the Spanish or Mexican Governments," the failure to present *it* to the board was fatal to its present maintenance. In support of this position the following cases are cited and relied upon and quoted at length, viz:

Botiller v. *Dominguez* (130 U. S., 238).

Beard v. *Federy* (3 Wall., 478).

Knight v. *U. S. Land Association* (142 U. S., 161, 201).

Houston v. *San Francisco* (47 Fed. Rep., 337).

More v. *Steinbach* (127 U. S., 70).

United States v. *Castillero* (2 Black., 17).

Newhall v. *Sanger* (92 U. S., 761).

De Guyer v. *Banning* (167 U. S., 723).

Los Angeles F. & M. Co. v. *Thompson* (117 Cal., 594).

If the purpose of citing all these cases was to show that they held that it was necessary to present all claims to title derived from the Spanish or Mexican Governments to the Board of Land Commissioners for confirmation, *including the claims of "third persons"*—as such term is used in the 15th section of the act of Congress, March 3, 1851—then we submit that such purpose

has entirely failed, *as no one of such cases holds that it was necessary to present to the land commission the claims of "third persons."* If, on the contrary, the purpose of such citation of authorities was merely to show that it was necessary to present to the board for confirmation all claims *other than those of "third persons,"* then such citation of authorities was not needed, as this we conceded throughout our entire argument. There is no controversy between the parties to this action on that subject

We have freely admitted, and it was too clear to be denied, that in so far as *Byrne* v. *Alas* can be considered as having held that it was unnecessary to present *complete* and *perfect* claims to the Board of Land Commissioners for confirmation, it has been directly overruled by the United States Supreme Court, especially in *Botiller* v. *Dominguez* (130 U. S., 238), which holds that it was just as necessary to present to the board *perfect claims*, as imperfect or inchoate claims; as the principal purpose of the act was to segregate private property from public domain, and this could not be done unless "*all claims*," both perfect and imperfect, were presented and their boundaries defined. But we have insisted that "*all claims*" as used in the Botiller and other cases, does not include, and was not intended to include, the claims of "third persons;" as the very meaning of the term "third persons," as used in the fifteenth section of the act of March 3, 1851, is those persons who hold claims prior and paramount to the claim that was presented to the board and confirmed,

and which sustain to such confirmed claim some relation of privity or trust, such as will enable them to take advantage of the presentation and confirmation of such other claim, and have it inure to their benefit and relieve them of the necessity of presenting their special claim for confirmation.

In the passage of the act of Congress of March 3, 1851, the Government was merely interested in severing private property from the public domain and in fixing the boundaries of each: not in adjusting equities or rights between the holders of legal titles and others having equitable rights or easements in or servitudes upon private property. Such equitable owners, or parties holding easements in or servitudes upon lands, were not cut off nor concluded by patent therefor being issued to the holder of the legal title; but their interests were thereby protected and preserved unchanged, neither the grantee nor the owner of the equitable estate sustaining any change whatever in the character of his title, or in his relation to the property.

ANALYSIS OF AUTHORITIES CITED BY THE COURT.

We ask the indulgence of this court while we analyze the cases cited and relied upon by the supreme court of California as upholding the conclusion reached—that the failure of the defendants to present their claim to the Board of Land Commissioners for confirmation, within the time prescribed by the act of March 3, 1851, was fatal to their rights in the premises.

The court begins the discussion of this question by

stating that the doctrine as established by that court in *Byrne* v. *Alas*, "as to the consequences resulting from nonpresentation of claims of title to lands arising under the laws of Spain and Mexico and the scope and effect of patents based on said claims of title, can no longer be considered as au hority;" and the cases cited are to sustain this proposition.

BOTILLER v. DOMINGUEZ (130 U. S., 238) is the first and chief case cited in support of this position. That was an action of ejectment brought by the plaintiff holding title under a perfect Mexican grant—which had never been patented, and which had never been presented to the Board of Land Commissioners for confirmation—against defendants claiming the property *as public lands*, subject to settlement under the public land laws. No claim for the land in controversy had ever been presented by *any one* to the Board of Land Commissioners for confirmation. It had, therefore, never been segregated from the public domain by proceedings under such act. The trial court, and supreme court of California decided that the grant *being perfect*, the grantee was not called upon to present the same to the land commissioners for confirmation. Upon writ of error the United States Supreme Court held that the act of March 3, 1851, applied as well to *perfect* as to *inchoate* grants; and consequently reversed the decision of the California supreme court. That case was different from the case of *Byrne* v. *Alas* and the case now at bar in several respects.

In that case no claim for the land in question had

ever been presented to the Board of Land Commissioners *by any one*, and it consequently had never been adjudicated to be private property. Hence, under section 13 of the act of Congress, at the expiration of two years from the passage of the act, the land became a part of the public domain. In that case no proceedings under the act of 1851 had been had, and no patent had been issued thereon, and, therefore, *in that case no question could arise as to who were "third persons"* not affected or bound by such proceedings or patent. And, furthermore, the plaintiffs in that case were not Indians—wards of the nation—relieved from the necessity of presenting their claims to the board by the provisions of the sixteenth section of the act in question. Such decision does not affect the law of *Byrne* v. *Alas*, in so far as the latter case determines what were the property rights of Indians under the Mexican law, or in so far as it construes the fifteenth and sixteenth sections of the act of Congress of March 3, 1851, nor does it militate against the position of the defendants herein claiming title under the law as established in *Byrne* v. *Alas, except in so far as it holds that it was just as necessary to present for confirmation a perfect claim as an inchoate or imperfect one.*

The language of Justice Miller in *Botiller* v. *Dominguez*, quoted by the court to the effect that it was necessary for "*every* person claiming land in California by virtue of any right or title derived from the Spanish or Mexican Government," to present the same for confirmation to the board of land commissioners, was broader than the necessities of the case before the

court warranted, and was clearly not necessary to the decision of the question there involved; and taken in its most sweeping sense would be utterly destructive of the fifteenth section of the act in question, which was intended to protect the interests of "third persons" without the necessity of compelling the presentation of their claims to the board of land commissioners. That the language of Justice Miller above quoted is much broader and more sweeping and comprehensive than the court intended, is made evident by the following language, contained in the same decision, from which it is clear that it was not intended by such decision to lay down a rule which would require all conflicting claims to the same lands, as between private parties, to be presented to the board for confirmation and adjustment as between the claimants. The language we refer to is as follows, viz:

"*Obviously it was not intended (by the statute) to adjust or settle titles between private citizens making claims to the same lands. It is equally clear that the main purpose of the statute was to separate and distinguish the lands which the United States owned as property (which could be sold to others, either absolutely or by permitting them to settle thereon with preemption rights, or which could be reserved from public sale entirely) from those lands which belonged either equitably or legally to private parties under a claim of right derived from the Spanish or Mexican Government. When this was done the aim of the statute was attained. * * * This was the purpose of the statute.*"

No stronger corroboration of the position for which we here contend can be found than is afforded by this

language. The gist of that decision, and in fact the *only point necessarily decided by it*, is that in order to determine what property in California was private property and what was public domain it was just as necessary to present *perfect* grants to the board for confirmation as to present inchoate or imperfect grants. This can be admitted and yet not make it necessary for Mission Indians on Mexican grants in California to present their claim to the Board of Land Commissioners, *where the land they occupy has already been segregated from the public domain and adjudicated to be private property by the presentation, confirmation, and patenting of the same*—all done at the instance of the grantee from the Mexican Government, who under the former sovereignty held the title thereto subject and subordinate to the Indians' right of occupancy and in trust for their use and benefit. Such presentation, confirmation, and patenting operated to segregate effectually and forever the lands in question from the public domain, and prevented the same becoming a part of the public domain under the thirteenth section of the act. *Botiller* v. *Dominguez* does not in any way conflict with the rule laid down in *Byrne* v. *Alas* as to who are "third persons" under the fifteenth section of the act of March 3, 1851. In fact, *the inquiry as to who were such "third persons" was in no way involved in or determined by such case. No proceedings were ever had under such act, and no patent had ever issued thereunder, and, therefore, no question could arise as to who were third persons not bound by such proceedings or patent.*

The next case cited by the court and quoted from at length is that of BEARD v. FEDERY, (*3 Wall., 478*). In the case of *Beard* v. *Federy*, the defendant, as a means of defeating plaintiffs' patent, which was based upon a confirmed Mexican grant, relied, first, upon another grant from the Mexican Government, which was not presented to the Board of Land Commissioners for confirmation—taking the position that the grant to plaintiff was void, and the grant to defendant was valid and perfect, and therefore need not have been presented to the board for confirmation; and, second, on his adverse possession after the change of sovereignty. The United States Supreme Court held that the decision of the Board of Land Commissioners and of the Land Department in approving and patenting plaintiffs' claim was conclusive, except as against third persons, under the act of March 3, 1851. That defendant was not such a third person, for the reason (1) that the grant under which he claimed *was absolutely void* and of no vitality whatsoever; hence he could derive no benefit from it, either as a "third person" or otherwise; and (2) that the long-continued adverse possession after change of sovereigty could not aid defendant, as this was not the claim of a third person, *as it had its origin long subsequent to the transfer of sovereignty, and was not anterior or paramount to the claim patented to plaintiff*, and hence the claim was not that of a third person protected by section fifteen of the act of Congress. We have no fault to find with the definition of "third person" as given in this decision, nor with the

result of the decision, as it was in entire accord with the law on the subject then and ever since existing. It can not be used as an authority in conflict with *Byrne* v. *Alas*, as it only holds that a void grant creates no right in its holder, and that a party claiming by adverse possession after change of sovereignty is not a third person referred to in the act March 3, 1851.

The next case quoted by the court is that of KNIGHT v. THE UNITED STATES LAND ASSOCIATION (142 U. S., 161). In that case two fee simple titles were involved, only one of which antedated the change of sovereignty, and that one was presented to the Board of Land Commissioners and confirmed and patented. The other was a claim derived from the State of California *under title subsequent to the change of sovereignty*, and therefore possessed none of the requisites of the claim of "third persons" whose rights were protected under the act of March 3, 1851. The court merely held that such subsequent claim based on title derived from the State of California was not the claim of a third person entitled to protection by section 15 of the act of March 3, 1851. The doctrine there affirmed in no way militates against our position here. There is much in such case, however, in the general language used, strongly upholding the position for which we are here contending.

Instead of being adverse to the law of *Byrne* v. *Alas*, this case is one of the strongest in the books in confirmation of many of the most important doctrines upon which *Byrne* v. *Alas* is founded; for instance, among other things, the court says:

"It is equally well settled that when the United

States acquired California from Mexico by the treaty of Guadaloupe Hidalgo they were bound under the eighth article of the treaty to protect *all rights of property*, not merely property 'owned by Mexicans' in that territory emanating from the Mexican Government previous to the treaty (citing authorities). Irrespective of any such provision in the treaty, the obligation resting upon the United States in this respect, under the principles of international law, would have been the same" (citing a great number of authorities).

The court says: "The rights of the city of San Francisco, as successor to the pueblo, were superior to any *subsequently acquired* rights of California to the tide lands."

The same language occurs a number of times later in the case, showing that the claim involved *was not of a paramount or prior character to that patented, but was a subsequently acquired right*, which, of course, was concluded by the patent to the city.

Showing another difference between that case and this, it was conceded there that Mexico had an *unquestioned right* to dispose of the lands in question—tide lands—as she saw fit; whereas, it is well established that Mexico had *no power* to convey by grant—that would cut off the beneficial title of the Indians—lands that were in the possession of such Indians as the defendants here; hence the action of the Mexican Government *in granting tide lands would be conclusive, but in granting lands in the possession of the Indians would not be conclusive as against the beneficial title of the Indians.*

In stating the effect of a patent, based upon a Mexican grant, the court in the Knight case says:

> As against the Government, this record, so long as it remains unvacated, is conclusive, and it is equally conclusive against parties *claiming under the Government by title subsequent:* * * * if parties asserting interest in lands *acquired since the acquisition of the country*, could deny and controvert this record, and compel the patentee in every suit for his land to establish the validity of his claim, etc., the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor.

In his elaborate concurring opinion in the same case, Justice Field makes an exhaustive review of the authorities on the subject. Among other things, he says:

> The title under the patent *necessarily antedated any possible claim of the State of California to the lands within the limits of the pueblo;* it went back to the acquisition of the country from Mexico; when the United States acquired California, *the inhabitants were entitled, by the law of nations*, to protection under the new Government, to *all rights of property* then possessed by them. Jurisdiction and sovereignty passed from one nation to another by the cession, but not private rights of property. *Their ownership remained as under the former Government*, and by the term *property*, as applied to lands, *all titles* are included, legal or equitable, perfect or imperfect; "it comprehends," as said by this court, in *Soulard* v. *U. S.* (37 U. S., 100), "*every species of title*, inchoate

> or complete, it is supposed to embrace those rights which are executory, as well as those which are executed;" *in this respect the relation of the inhabitants (not merely Mexicans) to their Government is not changed. The new Government takes the place of that which has passed away.*

The court proceeds as follows:

> Whatever property was ceded to the United States from Mexico, whether marsh lands or tide lands, passed subject to the obligations to protect existing claims to them of all parties. The State could take no greater interest than the United States acquired. All lands she received went under her control charged with the equitable claims of those which the United States was bound by the treaty and law of nations to protect. * * * The duty and power of the United States in the execution of their treaty obligations to protect the property claims of *all persons*, natural or artificial, were superior to any *subsequently acquired* interest of the State or individuals. Mexico owned the tide lands as well as the uplands, and it was, of course, in her power to make such disposition of them in the establishment and organization of her pueblos as she may have judged expedient.

Later in the case, in describing the effect of a United States patent, based upon a confirmed Mexican grant, the court says:

> As against the Government, so long as it remains unvacated, it is conclusive, and it is equally conclusive against parties *claiming under the Government by titles subsequent.* The patent

> being thus conclusive, *can only be resisted by those who hold paramount title to the premises from Mexico antedating a title confirmed;* that is, by persons who can successfully resist any action of the United States in disposing of the property, or in perfecting the title of the claimant.

It is apparent from this language that the case is in thorough harmony with all the prior cases and holds merely that the claimant, the United States Government, and parties claiming under the United States by title subsequent, are bound by proceedings had under the act of March 3, 1851: and it clearly admits that parties holding by a title paramount to and antedating that confirmed, which could (had it been presented to the board) have defeated or limited the title confirmed, are not bound by proceedings had under the statute.

The case, however, authoritatively decides but one point, and that is that a patent based upon a confirmed Mexican grant *can only be resisted by those who hold paramount title to the premises from Mexico antedating the title confirmed.*

The next case cited by the court is HOUSTON v. SAN FRANCISCO (47 Fed. Rep., 337). The opinion rendered in that case was upon a motion to dismiss for inexcusable failure of the complainant to prosecute. The sufficiency of the complaint, or of the cause of action contained in it was not involved in the motion. In fact the motion conceded the sufficiency of the complaint as a pleading. The affidavits used upon the motion conclusively showed the failure of the complainant to make any effort to obtain service of process for over

two years, and the court holds "for such failure to prosecute the suit the amended bill, and, indeed, the whole case, may be properly dismissed."

Our position is, that so much of the decision as passed upon the sufficiency of the cause of action set up in the complaint was unnecessary to the decision of the question involved, and therefore is not binding as authority. Furthermore, it was rendered not by the United States Supreme Court—whose decisions alone are binding upon the California supreme court or upon this court—but by the United States circuit court. But the main distinguishing feature between *Houston* v. *San Francisco* and the present case is that in that case the conflict was between a later grant and an earlier grant, neither of which referred to the other or purported to recognize the validity of the other; the grants were entirely distinct, each absolutely hostile to the other, each purporting to convey the title *in fee simple absolute, and either of which, if valid, would have been utterly destructive of the other and irreconcilably in conflict with the other.* Whereas, in the case at bar the title of the defendants is in no way hostile to the title of the plaintiffs, but the same is recognized and preserved not only by the general laws applicable to lands in the possession of Indians, but expressly recognized and preserved by the very terms of plaintiffs' grants, the senior grant preserving the same by providing that the grantee shall "not molest (*prejudicar*) the Indians that thereon may be established," while the junior grant provides that the grantee shall not interfere with

the "servidumbres." Therefore, in this case there is no necessary repugnance between the titles being asserted. *They may coexist without either being destructive to the other.* The legal title may well be in plaintiff, subject to the beneficial use or servitude in favor of the defendants.

We insist here that the recognition and reservation of the rights of the Indians in the various documents and in the law through which plaintiff must here derive title makes the preservation of the rights of the defendants a very part of the plaintiffs' title, and prevents the same being considered as hostile thereto, in the same sense in which a prior grant of the fee-simple title to one party, is hostile to a subsequent grant of the same character of title to another party—the former grant being in no way referred to in or preserved by the terms of the subsequent grant. In the case at bar the existence and validity of defendants' title is reconcilable with the existence and validity of plaintiffs' title, both under the law, and upon the very face of the grant under which plaintiffs claim. Whereas in *Houston* v. *San Francisco, the antagonism between the two claims asserted was utterly irreconcilable.* Furthermore, in this case, as has been shown, there was a privity and trust relation existing between the defendants, the owners of the beneficial title—the easement—and the plaintiffs, the owner of the legal title—the fee. Whereas in *Houston* v. *San Francisco,* no such relation existed, but the grants were absolutely hostile to each other, and each purported to pass the entire title, both legal and equitable, and *one was necessarily destructive of the other.*

Houston v. *San Francisco* is the first and only case that we know of, in which it is held that to be a "third person," who can take advantage of the presentation and confirmation of a grant to another, one must not only have a claim anterior and paramount to the title confirmed, but that there must be some equitable relation, privity, or trust existing between the parties, that will enable the third person in equity to claim the benefit of the act performed by the party whose title is confirmed and patented. This doctrine, however, does not militate against the rights of the defendants here, as already shown; for the plaintiff, under the Mexican régime, merely held the legal title subject and subordinate to the complete beneficial interest in the Indians, and in trust for them to the extent of their interests in the prop[illegible]

MORE v. STEINBACH (127 U. S., 70) is the next case referred to by the court. In that case both plaintiff and defendant claimed under confirmed and patented Mexican grants—defendant's grant being the senior. Defendant's patent did not include the premises in controversy, but plaintiff's did. Defendant sought to show that his grant was complete and perfect without presentation to the Board of Land Commissioners, and that the boundaries thereof, as fixed by "juridical possession," under the Mexican Government, included the premises in controversy, and hence *he claimed that he was not bound by the confirmation and patent to himself, which excluded such premises.* The court held that his patent was conclusive upon him and the Government; that having submitted his claim to the

Board of Land Commissioners for confirmation, and having accepted patent therefor, he could not repudiate the patent in so far as it did not give him the land, which he claimed was included within the boundaries given by the Mexican Government; but that the decision of the Board of Land Commissioners, the district court, and the land office, in issuing patent, was binding upon him as much as to the question of boundaries as to any other matter involved in the case.

The court further held, however, that the defendant's claim was not perfect under the Mexican law, as he claimed it to be, as the Mexican authority ceased upon the 7th of July, 1846, whereas the "juridical possession" relied upon to perfect the title was not given to the defendant until November, 1847.

UNITED STATES vs. CASTILLERO (2 Black, 17). No question as to who are third persons not bound by proceedings had under the act of March 3, 1851, was involved in this case.

The next case cited is NEWHALL vs. SANGER (92 U. S., 761). This case did not involve the question as to who are "third persons" under the act of March 3, 1851, but merely held that lands within the claimed limits of a Mexican grant, whose boundaries were *sub-judice*, when a later grant by the United States Congress was made to a railroad company, did not pass to the railroad company, although it should subsequently develop that such lands were excluded from, and never were properly a part of, the Mexican grant.

The next case cited by the court is DE GUYER v. BANNING (167 U. S., 723). This case in no way

involved the question as to who were "third persons," whose rights were not affected by proceedings had under the act of March 3, 1851; but, like *More* v. *Steinbach*, it was an attempt to claim land not included within the granting clause of a patent based upon a confirmed Mexican grant. The whole contention was that the decree confirming the grant fixed the true boundaries thereof, and did not contain an exception which excluded the lands in controversy, whereas the patent, based upon an approved survey by the Land Department, did contain such exception, the effect of which was to exclude from the patent the lands in controversy. The contention of the party claiming under the patent was that he was not bound by this unauthorized exception contained in the survey and in the patent, but that he could rely upon the description in the decree of confirmation. The Supreme Court held that the lands in controversy, having been excluded from the survey, to which no objection was urged, as well as from the patent issued and accepted under a decree confirming the claim, the party claiming under the patent could not recover such lands so long as the patent remained uncanceled. The case in no way overthrows or even affects the doctrine of *Byrne* v. *Alas* as to who are third persons, who are not compelled to present their claims for confirmation to the Board of Land Commissioners.

The next and last case relied on by the court is Los Angeles Farming and Milling Company v. Thompson, (117 Cal., 594). This was an action in ejectment by plaintiff—claiming under United States patent,

based on a confirmed Mexican grant—against defendants, who were mere squatters, claiming the lands to be a part of the public domain and open to entry and settlement under the United States general land laws. Plaintiffs' title was attacked on the ground that the grant upon which it was based was void as being for lands not subject to grant. *No question was involved as to the finality of such patent against parties claiming under the Mexican Government by title prior or paramount to plaintiffs' claim that was confirmed and patented.* The defendants were not claiming to be "third persons" deraigning title from the Mexican Government by title anterior and paramount to the title confirmed and patented to plaintiffs; nor were they in any way seeking to have the confirmation and patenting of the plaintiffs' claim inure to their benefit; but on the contrary they assaulted plaintiffs' patent as being absolutely void, because the lands were not subject to grant under Mexican law; and that being void, it could be attacked by the defendants, whose only claim to title was a possessory right under the United States, having its origin long subsequent to the confirmation and patenting of plaintiffs' title.

The defendants claiming under the United States by title subsequent, of course were not third persons under the fifteenth section of the act of March 3, 1851, and this court merely held that the decision of the board of land commissioners confirming plaintiffs' grant was final, no matter how erroneous, and could not be questioned in a collateral attack by parties claiming under

the United States by title subsequent. If we were relying here upon plaintiffs' grant being *void* because it granted lands that were occupied by Indians, and hence not vacant, such decision would be fatal to our contention. But we are not doing this; on the contrary, we admit the grant to be valid, but as to these lands it only passed a bare legal title subject to defendants' continued right of occupancy, and that this condition of title was not changed by the subsequent confirmation and patenting by the Government. It is our claim that the beneficial interest in the Indians continued, notwithstanding the grant, hence the grant was subordinate to the Indians' right of occupancy, and that this subordination to defendants' possessory rights remained unchanged by confirmation and patenting. It will be thus seen that the question as to who are "*third persons*" who are not bound by proceedings had under the act of March 3, 1851, *was in no way involved* in the case of *Los Angeles Farming and Milling Company* v. *Thompson;* hence such case can not be considered authority upon that subject. The decision in this case has been recently affirmed by this Court, but there is nothing in the opinion rendered in conflict with our position.

NO CASE HAS BEEN CITED, AND NONE CAN BE FOUND, WHICH HOLDS THAT A VALID, LAWFUL USUFRUCT OR EASEMENT IN OR SERVITUDE UPON LAND UNDER THE MEXICAN LAW, WAS EXTINGUISHED BY THE CONFIRMATION OF A LEGAL TITLE, WHICH LEGAL TITLE PRIOR TO THE CHANGE OF SOVEREIGNTY WAS, UNDER THE MEXICAN LAW, HELD SUBJECT TO SUCH EASEMENT, SERVITUDE, OR USUFRUCT; NOR HAS A CASE BEEN CITED HOLDING THAT AN OWNER OF SUCH AN EASEMENT,

SERVITUDE, OR USUFRUCT WAS CALLED UPON TO PRESENT THE SAME TO THE BOARD FOR CONFIRMATION, IN ORDER TO PREVENT IT FROM BEING DEFEATED BY THE OWNER OF THE LEGAL TITLE COVERING THE SAME LAND—BUT SUBJECT TO SUCH EASEMENT, SERVITUDE, OR USUFRUCT—HAVING HIS CLAIM CONFIRMED.

Had the lands never been segregated from the public domain by *any one* presenting a claim therefor, then the numerous authorities cited by the court, like *Botiller* v. *Dominguez*—holding that all claims must be presented to the board for confirmation—would be applicable; and if the plaintiffs' and defendants' claims were such as could not coexist without one being utterly destructive of the other—as is the case between two distinct grants, neither referring to the other, and each purporting to vest the absolute fee-simple title, as in *Houston* v. *San Francisco*, *supra*—it might be held that the presentation and confirmation of one would afford no protection to the other, owing to the fact that they were irreconcilably repugnant to each other and could not coexist, nor either inure to the benefit or protection of the other.

In this case the claims asserted are not irreconcilably repugnant, and may coexist, and neither result in the destruction of the other. Pico and Warner accepted their grants chargeable with a notice of the lawful rights of the Indians, which the fact of the Indian possession gave them. This easement, servitude, or usufruct in the defendants is in no way inconsistent with the legal title in plaintiffs. In fact, the very word "*easement*" implies that the fee resides in

another than the owner of the easement; otherwise a merger would take place and the easement become extinguished in the fee. In this case the abandonment of the easement, servitude, or usufruct would vest complete title in the grantee.

Thus, it must be apparent that there is not in the nature of things any irreconcilable hostility between the coexistence of the titles of plaintiffs and defendants any more than there would be in the provisions of a decree, which, by its very terms, confirmed a legal title in the plaintiffs, subject to the continued use and occupancy of the defendants. But, as the land commission was not a tribunal, organized for the purpose of trying, determining, or fixing property rights as between individuals asserting title to the same property—whether under the same or different documents—of course it was not necessary for the commission, by the terms of its decree, to have preserved the easement, usufruct, or servitude in favor of defendants.

If we are correct in our analysis of the cases cited and relied upon by the court as holding that *Byrne* v. *Alas* has been overruled as to the scope and effect of patents based on confirmed Mexican grants, it must be clear that such decisions in no way impair the law in *Byrne* v. *Alas*, except in so far as they hold that it was necessary to present to the Board of Land Commissioners *perfect grants*, as well as inchoate or imperfect ones. *None of them hold that it was necessary to present for confirmation the claims of "third persons."* Nor do they in any way change the law of *Byrne* v. *Alas* as to who constitutes such "third persons."

After discussing these cases—only three of which, as we have shown, involve the question as to who were third persons not bound by proceedings had under the act of March 3, 1851—the whole question as to whether or not the Indians are "third persons" who can take advantage of the confirmation and patent of the Warner title, and who are not bound to present their claims for confirmation, is disposed of by the court as follows:

> But it is claimed that Warner took his title subject to the trust or rights of Indians. Neither the grant nor the patent contains anything to support this contention, and there is no privity between them or the grantee, or anything from which a trust could arise in their favor as against his grant or the patent issued thereon. They are not third persons within the meaning of the fifteenth section of the act of 1851, as already shown, but are mere strangers to the record.

We discuss this conclusion of the court in the next subdivision of this brief.

(*b*) THE INDIANS ARE NOT "MERE STRANGERS" TO THE TITLE, BUT ARE "THIRD PERSONS," WHOSE INTERESTS ARE NOT AFFECTED BY THE CONFIRMATION AND PATENTING OF WARNER'S CLAIM; AND THEIR RIGHTS ARE PRIOR AND PARAMOUNT TO WARNER'S CLAIM, AND UNDER THE MEXICAN RÉGIME A RELATION OF TRUST AND PRIVITY EXISTED BETWEEN THE INDIANS, HOLDING THE BENEFICIAL INTEREST (THE RIGHT TO USE AND ENJOY), AND THE GRANTEE, HOLDING THE BARE LEGAL TITLE. THAT A TRUST AS TO TITLE NECESSARILY EXISTS, WHEREVER THE TITLE STANDS IN

ONE PARTY, AND THE ENTIRE RIGHT TO USE AND ENJOY IN ANOTHER; AND WHERE SUCH RELATION EXISTS IT IS IMMATERIAL WHETHER IT IS CREATED BY CONTRACT OF THE PARTIES, BY RESERVATION IN THE GRANT, OR BY OPERATION OF LAW; THE PRIVITY OF ESTATE THUS EXISTING, DOES NOT DEPEND UPON THE METHOD OR MODE OF ITS CREATION, BUT UPON THE ESSENTIAL CHARACTERISTICS OF THE RELATIONSHIP.

In the opinion under consideration the California supreme court has held that under the Mexican régime the defendants were "mere strangers" to the Warner title. That is, they claimed in hostility to it, and no privity or trust relation existed between them, that would constitute them "third persons" whose rights would be protected by the confirmation and patent of the Warner claim. It seems to us that these conclusions can not be reached except by a disregard of the relation that the Spanish and Mexican Government sustained to the Indians before the land was granted, and the relation which the Indians sustained to the grantee prior to the change of sovereignty.

No other nation has ever shown such solicitude for the welfare of the civilized and Christianized Indians as was shown by the Spanish and Mexican government. They were the most cherished wards of the nation, and every possible safeguard for the protection of their interests was observed. All lands in the possession of such Indians were by the nation held in trust for their continued use and benefit, and such trust was not determined by grants of the same made by the Government; but as to the land so occupied the

grantees took the bare legal title, subject to, and burdened with, the continued right of use and occupancy in the Indians, and this without the necessity of a special clause in the grant to that effect.

The whole tenor of Spanish and Mexican law on this subject supports and fully sustains this view. See the numerous authorities to that effect quoted in *Byrne* v. *Alas* and the conclusion of the court there reached, which the opinion here in no way impairs or even purports to limit or qualify. If this is a correct statement of the relation which the Indian sustained to the grantee holding the legal title under the former sovereignty, then we have in the Indian the complete beneficial use (the right to use and enjoy), lacking only the power of alienation, and subject to being lost by voluntary abandonment, and in the grantee the dry legal title, having no other virtue or vitality—except upon the contingency of extinction of the Indian title by voluntary abandonment, when both the legal and the equitable title would become merged in the grantee, and the latter's title thus rendered complete and absolute. And whether such relation was created by reservation in the grant, or by the force, effect, and operation of the general law of the land, is quite immaterial *so far as the character of the relation itself is concerned.* It needs no argument to show that where the legal title stands in one party, and the entire beneficial interest in another—either by operation of law or by contract—that there is a relation of trustee and beneficiary between them as to the property, and that there is a

privity between them; and it is quite immaterial whether such relation is created by operation of law or by contract. It is equally binding. The grantee and the occupant sustain a mutual relationship to the same rights of property, and therefore are in privity with each other, one having the right to use and enjoy, the other the right to dispose of it; or, to use the analysis of Escriche, "the property is composed of the right to enjoy and to dispose of the thing. Separating these rights, that to enjoy is called usufruct, and that to dispose of, the bare property (*nuda propiedad*)," or, as we term it, the bare legal title. Such rights may coexist in different parties.

There is no irreconcilable conflict, as between two hostile grants, each purporting to vest a complete and absolute title, which could not coexist; as one would necessarily be destructive of the other, and could not operate to inure to the advantage of the other. From the foregoing analysis of the landed rights of the Indians under the Spanish and Mexican régime, it is clear that the Indian was the beneficiary of the title, the grantee the mere trustee thereof for the Indian's benefit, with the possible contingency of becoming the absolute owner by the Indian's abandonment of his possession. That the relation of trustee and beneficiary in such a case exists it would seem difficult to deny; that such parties sustain a mutual relationship to the same rights of property, just as they would if the relation had been created by their own contract, seems equally certain, and therefore there is a privity between them. The American and English Encyclopedia of Law (1892), volume

19, page 156, says: "The term 'privity' denotes mutual or successive relationships to the same rights of property." To the same effect see 1 Greenleaf on Evidence (16th ed.), § 189; Anderson's Law Dictionary, page 813; *Stacy* v. *Thrasher* (6 Howard, 44). We submit, therefore, that there was a relation both of privity and of trust existing between the Indians in possession—the owners of the beneficial title—and the grantee under the Mexican Government, the owner of the legal title; and that the claims of the Indians were anterior and paramount to those of the grantee, and hence the Indians were "*third persons*" under section 15 of the act of Congress of March 3, 1851, whose rights were not affected by the confirmation and patent of the claim of the grantee. This provision of the act of March 3, 1851, has been frequently construed by the supreme court of California, and the United States Supreme Court, and it has always been held that third persons therein referred to are those holding under title which accrued prior to the change of sovereignty, and which was paramount and superior to that confirmed.

Had Warner by his own contract with these Indians, prior to the change of sovereignty, given them and their descendants just such a right of use and occupancy of these lands as we are now claiming they possess as a result of the general laws of Spain and Mexico, it certainly would not be then denied that they would be "third persons," protected by the confirmation and patent to Warner, and that his action in obtaining patent inured to their benefit, just as much as it would inure to the benefit of his lessee or mortgagee; this being

so, why should not their rights be equally protected when created by positive law instead of by contract? The rights are identical in character, the relationship is the same, regardless of how created, and the law affecting it is the same. The estate existing in the Indians is in no way different; the same privity of estate and the same trust relation exists; there being no distinction except in the mode or method of creating the relationship, there is no distinction in the law pertaining to and governing it; and if when created by contract, the holder of the right of use and occupancy is a "third person," he is equally so when created by operation of law. He is no more a "stranger to the title" in one case than in the other. When the relation is created by contract he is a "party to the title" by virtue of *two* laws, viz, the general law of contracts and the law permitting governors to grant lands; whereas, when the relation is created by the general law of the land, he is a party to the title by virtue of the *single* law that all grants of lands in possession of such Indians are made subject to their continued right of use and occupancy.

AUTHORITIES DEFINING THE MEANING OF THE PHRASE "THIRD PERSONS" AS USED IN THE ACT OF MARCH 3, 1851, AND SHOWING THE EFFECT UPON SUCH, OF CONFIRMING AND PATENTING MEXICAN GRANTS.

By way of confirming our position that the land commissioners frequently confirmed claims, and patents afterwards issued therefor, purporting to convey absolute title, when really such confirmation and patent

passed simply the bare legal title subject to an equitable right or title in third persons, we need but quote from the opinion of Justice Field, in TOWNSEND v. GREELEY (5 Wall., 335), where he uses the following language: "Nor is there anything in the act of March 3, 1851, *which changes the nature of estates in land held by individuals or towns.* * * * By proceedings under that act imperfect rights, mere equitable claims, might be converted by a decree of the board or court, and the patent of the Government following, into legal titles, *but whether the legal title thus secured to the patentee was to be held by him, charged with any trust, was not a matter upon which either the board or court were called upon to pass. If the claim was held subject to any trust before presentation to the board, the trust was not discharged by the confirmation and the subsequent patent. The confirmation only inures to the benefit of the confirmee so far as the legal title is concerned. It establishes the legal title in him, but it does not determine the equitable relations between him and third parties.*

"It is true if the claim was presented by one designating himself trustee, executor, or guardian, or if such relation of the claimant to others appeared in the examination of the case before the board or court, the decree *might* declare that the confirmation was to the claimant in such fiduciary character. *But if the trust was not stated, and did not appear, the legal title was none the less subject to the same trust in the hands of the claimant.*" From the foregoing language it is quite apparent that it was the judgment of the Supreme Court of the United States

that a claimant who presented his claim for confirmation before the board of land commissioners *acquired no different character of title from that which formerly existed* in so far as the rights of the claimant as against other parties having equities in the property were concerned. The title referred to in the above case was that of the pueblo of San Francisco; and in that case the court held that although the confirmation and patent was to the city without disclosing any trust in favor of the inhabitants thereof, that nevertheless, as by the general laws of Spain and Mexico, the Mexican pueblo held title subject to certain trusts in favor of the inhabitants thereof, and subject to certain well-established property rights in favor of such inhabitants, that those rights and trusts were in no way cut off or divested by virtue of the confirmation and patent to the city.

The analogy between the case of *Townsend* v. *Greeley* and this case is quite apparent when it is remembered that the California supreme court in *Byrne* v. *Alas* held that if lands in the possession, use, and occupancy of civilized Indians were granted by the Mexican Government, that the grantees received the grant subject to the continued right of such Indians to so use, occupy, and possess their lands. Such being the case, it is apparent that the Indian's title—whether it be called an easement in, or a servitude upon, or a usufructuary interest in, or the beneficial ownership—was anterior and paramount to the rights of the grantee, and that the rights of such Indians had their origin prior to the transfer of sovereignty from Mexico to the United

States, and prior to any duty in the premises devolving upon the United States. Such being the case, the confirmation of the Mexican grant upon which plaintiffs' patent rests and the issuance of such patent *in no way "changes the nature of the estate in the land" held by plaintiffs.*

The supreme court of California in the case of HART v. BURNETT (15 Cal., 530), reviews at great length the general laws of Spain and Mexico, bearing upon the rights of Pueblos to the lands within their boundaries, and it reaches the same conclusion as that reached by the United States Supreme Court in the case of *Townsend* v. *Greeley*, viz: That the Pueblo title to such lands was not absolute, but was held subject to certain uses in favor of the inhabitants thereof.

In reviewing the act of Congress of March 3, 1851, the court holds that Congress "*could neither change an existing trust nor destroy existing uses*," and that as, under the Mexican system, the Pueblos had no power to alienate, change, or destroy such trust or impair former uses, the confirmation and patenting of the lands to the Pueblos gave them no such power. The court says:

> We see nothing which changes the substance of the trust. The property remained afterwards as it was before, subservient to the uses and purposes for which it was given. * * * If this trust thus impressed upon these lands has ever been changed, it rests with respondents to show how, and when, and where, and in what respect this change has been effected.

> That this property came from the Mexican Government stamped with this trust, we think we have abundantly demonstrated.

In the case of MEADER vs. NORTON (11 Wallace, 442), in referring to the act of March 3, 1851, the court says:

> Applicants for such confirmations were required to present their claims to the commissioners, when sitting as a board; but the act of Congress made no provisions for the notice to any adverse claimant, and the proceedings before the commissioners were wholly *ex parte*, unless opposed by the district attorney. * * * Nothing more is contemplated by the proceedings under that act than the separation of the lands which were owned by individuals from the public domain.

And, later in the same decision, the court says:

> Where one party claims a legal right to property to which another has a better right, a court of equity will convert him into a trustee for the true owner, and compel him to convey the legal title.

In the case of *Doolan* v. *Carr* (125 U. S., 618), the court clearly shows that lands, which either by general or special laws are reserved from grant, do not pass by patents purporting to convey the same, except in trust for the parties who are in equity entitled thereto.

In the case of WILSON vs. CASTRO (31 Cal., 421) the supreme court of California holds that the confirming of a Mexican grant and the issuing of the patent therefor to a person believing himself to have a good title thereto, but who, as a matter of fact, was mistaken

concerning the same, and who had no title thereto, does not deprive the true owners of such grant of their interest therein, although they did not present their claim to the board of land commissioners for confirmation, but that the patentee holds the legal title in trust for the true owners.

In the course of the opinion the court quotes the following significant passage on the subject of constructive trusts from Hill on Trustees, page 197, star page 144, namely:

> Whenever the circumstances of the transaction are such that the person who takes the legal estate in property can not also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner so as to convert him into a trustee of the parties who, in equity, are entitled to the beneficial enjoyment.

From the case of UNITED STATES v. MORILLO (1 Wallace, 706) it clearly appears that it was never the purpose of the act of March 3, 1851, to afford a tribunal in which conflicting rights of private parties to lands claimed from the Mexican Government could be litigated as between themselves. The court says:

> The act of March 3, 1851, under which these proceedings were had, contemplated primarily nothing more than the separation of the lands which were owned by individuals from the public domain. This is clearly expressed in the thirteenth section of that act. The fifteenth section declares that the final decree rendered in these

> proceedings, and the patents issued under them, shall be conclusive between the United States and said claimants only, and shall not affect the interest of third parties. We therefore agree with counsel for the appellant *that when the Government no longer claims that the land is public land the right of the United States to contest the case further ceases, and this court will not (in an appeal taken from such confirmation proceedings) entertain jurisdiction to determine to which of the two private claimants it may belong.*

In *Teschamacher* v. *Thompson* (18 Cal., 11) Justice Field, as chief justice of the supreme court of California, defines the "third persons" referred to in section 15 in the act of March 3, 1851, as follows:

> The "third persons" against whose interest the action of the Government and patent are not conclusive, under the fifteenth section of the act March 3, 1851, *are those whose title accrued before the duty of this Government and its rights under the treaty attached.*

In *Leese* v. *Clark* (20 Cal., 387, 425), the same eminent jurist again defines such term in the following language:

> The term "third persons" refers not to all persons other than the United States and the claimant, *but to those who hold independent title arising previous to the acquisition of the country.* The latter class are not bound by the decrees and the patent, for they do not hold in subordination to the action of this Government, nor by any title subsequent, but by title arising anterior to conquest.

In the case of *Adam* v. *Norris* (103 U. S., 591), the Supreme Court of the United States gives a most accurate and condensed statement as to the force and effect of patents issued in pursuance of the act of March 3, 1851. The court says:

> Counsel for plaintiffs have argued that the patent from the United States is final and conclusive on everybody and can not be disputed in a court of law as to the title it confers, and no doubt where the patent is for land of which the Government had an undisputed title the proposition is generally, if not always, true. *But the United States, in dealing with claimants of lands under Mexican grants, which had come into the political control of our Government by the treaty of Mexico, never made pretense that it was the owner of the land so granted by Mexico.* When, therefore, guided by action of the tribunals which the Government had established to pass upon the validity of these alleged grants, it issued a patent to a claimant, it was in the nature of a quitclaim, an admission that the rightful ownership had never been in the United States, but at the time of the cession it had passed to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced by this court.
>
> The leading cases are *Beard* v. *Federy* (8 Wall., 478); *Henshaw* v. *Bissell* (18 Wall., 268); *Miller* v. *Dale* (92 U. S., 478).
>
> Such a patent was, therefore, conclusive only as between the United States and the grantee, and was evidence that as to them the claimant had established the validity of the grant.

We think it is apparent, from the foregoing authorities, that the defendants in this case are such "third persons" as are protected by the 15th section of the act in question.

As under the laws of Mexico all grants were made subject and subordinate to the continued right of occupancy of Indians in possession, it must be evident that a showing before the land commission that these lands were occupied by Indians when granted to plaintiffs' predecessor would have resulted—if the board had considered it had jurisdiction to determine the equities between the parties—in the confirmation of plaintiffs' grant being made, subject to the continuing possessory rights of the defendants, as those rights were fixed by the general laws of Spain and Mexico, and as such rights are defined in *Byrne* v. *Alas*, *supra*, and the authorities there cited.

It is immaterial whether the equities or rights of third persons which are preserved by the 15th section of the act in question grow out of a contract between the parties, or out of some act of estoppel in pais, or whether such equities grow out of the general law of the land—which law preserves the Indian rights of occupancy as against all parties—or whether the same were created by a special or a general reservation in the grants which were confirmed and patented. Whether these rights and equities are based upon contract, special reservation, estoppel in pais, or operation of the general law is unimportant.

The cases of *Doolan* v. *Carr*, *Townsend* v. *Greeley*, and *Hart* v. *Burnett*, already cited, give illustrations of

equities and trusts created by operation of law and not by contract, which are not cut off by patent.

"THIRD PERSONS," AS THAT TERM IS USED IN THE ACT OF MARCH 3, 1851, WERE NOT REQUIRED TO PRESENT THEIR CLAIMS TO THE BOARD OF LAND COMMISSIONERS FOR CONFIRMATION.

In respondent's brief in this case in the court below it was claimed "that there can be no superior title (of a third person) which had not passed the scrutiny of the board," and that "there can not be any paramount title from the Mexican Government except such title as is evidenced by the decree of the Board of Land Commissioners and subsequent proceedings under the act of March 3, 1851." So little is said in the opinion in this case in the way of defining the rights and privileges of "third persons" under the act in question, that we are unable to say as to whether or not this view of counsel has been adopted by the court. In construing the long list of cases cited by the court as being fatal to the rights of the defendant here, it would seem that the court had been influenced by this contention of counsel for respondent, and that its conclusion was equivalent to a holding that it was necessary even for "third persons" under the act of March 3, 1851, to present their claims to the board of land commissioners, or ever afterwards be debarred from asserting them. While on the other hand that portion of the opinion which holds that these defendants "are not third persons within the meaning of the fifteenth section of the act of 1851" would indicate that if they were "third

persons" their title might have been sufficient even though not presented to the board.

Being therefore uncertain as to the court's position on this important question, we submit the following argument in opposition to counsel's contention:

If, as counsel for respondents maintain, only claims which were actually presented, confirmed, and patented can be considered as claims of "third persons," protected under the fifteenth section of the act, then the fifteenth section of the act is utterly meaningless, for such claims would be protected by *virtue of the presentation, confirmation, and patent*, and not by virtue of being the *claims of "third persons" not bound by proceedings had under the act.*

To say that proceedings under the act bind all but "third persons," and at the same time to claim that "third persons" are such persons as have proceeded under the act and had their claims confirmed and patented, is to say that there are no "third persons" upon whom proceedings under the act are not binding, and hence, that all the discussion in the cases as to "third persons" has been idle, as there are and can be no such persons.

In justification of this position it may be claimed that the *sole* purpose of section 15 of the act was merely to protect the holder of a paramount title against the holder of an inferior title, *both having been presented, confirmed, and patented;* but there is nothing in the authorities to justify such a narrow or limited application of the term, and, moreover, *such a provision would not*

have been required to have protected the holder of a paramount patent, as the general law would have done this, for it is a well-settled principle of law that where two patents have issued from a granting power, the senior in right will be protected against the junior without any special statute authorizing such course, just as a senior grantee from a private grantor is protected against a subsequent deed of the same property by such grantor to another.

When the language of the statute is taken in connection with the reason and purpose of the statute, and the ends to be accomplished thereby, and especially as the same has been construed by the great number of California and United States Supreme Court cases we have cited (notably *Townsend* v. *Greeley*, 5 Wall., 335, and *Hart v. Burnett*, 15 Cal., 530), the conclusion is irresistible that Congress merely intended by the act of March 3, 1851, as said in *Botiller* v. *Dominguez*, to furnish a means of discharging its treaty obligations by segregating private property from public domain, and giving the grantee such assurance of title as would bind the overnment and parties claiming under it by title subsequent: *Provided, however, that such action should not change the nature, characteristics or extent of the estate confirmed from what it formerly was under the Mexican Government, nor affect prior and paramount claims of those whose claims were not presented; and as to such conflicting claims it was not the purpose of Congress to provide a tribunal for adjustment.*

By confirming and patenting a claim under that act

the Government's interest in the controversy ceased, and its connection with the particular lands involved thereupon terminated. It thus formally declared that the same was private property and not public domain; but the conflicting rights of title as between the claimant, whose title was thus confirmed, and those holding prior and paramount titles from the Mexican Government were left as they existed at the time of the change of sovereignty, and could only be adjusted as between the parties in the ordinary tribunals, and not before the tribunals provided by the act of March 3, 1851. Even had defendants presented their title for confirmation before the board of land commissioners, or appeared to oppose the confirmation of plaintiffs' title, it may be well doubted as to whether or not the board would not have said:

> We are without jurisdiction to try these conflicting titles; our action in confirming the legal title in Warner will in no way prejudice the rights of the Indians, but if the same were valid existing rights under the Mexican Government, and constituted an easement, or servitude, or beneficial interest to which the legal title in Warner was by law subject, such would be the case after our decree confirming Warner's title, just as it was before the change of sovereignty; as under the law creating this tribunal it has no power to change the character of or enlarge estates confirmed, but merely to confirm them as they previously existed, and its confirmation can not affect any valid, existing, prior, or paramount title in privity therewith, and the whole

> question as to whether or not such prior and paramount titles existed is a question that can be determined by the ordinary tribunals in the ordinary manner hereafter, and will not be concluded by the decree of this board.

Such an opinion would have been in entire harmony with the great weight of subsequent authority construing the scope, purpose, and effect of the act of Congress of March 3, 1851.

Fourth.

CONCERNING THE COURT'S HOLDING THAT THE REPORT OF THE MEXICAN OFFICIALS THAT THE "VALLE DE SAN JOSE" WAS "VACANT AND ABANDONED," DISTINGUISHED THIS CASE FROM BYRNE vs. ALAS, AND OPERATED AS A CONCLUSIVE ADJUDICATION THAT NO INDIANS WERE IN POSSESSION OF THE LANDS HERE IN CONTROVERSY, AND THEREAFTER PRECLUDED THE CONTRARY FROM BEING SHOWN.

On this subject our claim is—

(*a*) THIS CASE CAN NOT BE DISTINGUISHED FROM BYRNE VS. ALAS, IN SO FAR AS THE REPORT OF THE PREFECT THAT THE LANDS WERE "VACANT" IS CONCERNED.

A careful examination of the opinion of *Byrne* v. *Alas* will show that the court is clearly in error in distinguishing this case from that, on the ground that here the Mexican officials reported the property to be "vacant," whereas such was not the case in *Byrne* v. *Alas*.

At the bottom of page 636 and top of page 637, *Byrne* v. *Alas* (74 Cal.), the following appears:

> The prefect reported that the Indians were "willing that the applicants settle upon the

> place, the mentioned Indians offering furthermore that as soon as the land will be occupied, those of them who are moving about will get together and live contented: that the land formerly a part of San Luis Rey *is now vacant.*"

What could "vacant" have meant in this connection? Certainly not that there were no Indians upon the property, but merely that the land was no longer occupied by the former proprietor, the San Luis Rey Mission, and the word "vacant" has the same meaning when used in the Warner grant. Certainly this case can not be distinguished from *Byrne* v. *Alas* by saying that the report of the prefect here stated the land was "vacant," for the report of the prefect in *Byrne* v. *Alas* did likewise. This case and *Byrne* v. *Alas*, therefore, in that regard are identical. This gives force to our next point, viz:

(*b*) THE WORDS "VACANT AND ABANDONED," USED IN THE REPORT MENTIONED, REFER ONLY TO THE OCCUPANCY OF THE RECOGNIZED PROPRIETOR OR OWNER—THE SAN DIEGO MISSION—AND DO NOT APPLY TO INDIAN OCCUPANCY.

Independent of the fact that in the grant to Estudillo in *Byrne* v. *Alas* the word "vacant" can not possibly be considered as referring to Indian possession, and independent of the convincing force of the argument to be drawn therefrom that the word "vacant" in such reports generally did not apply to Indian occupancy, we think it is perfectly clear from the context in the present case that the meaning of "vacant" as here used

is clearly referring to the occupancy of the San Diego Mission. The report of the local Mexican authorities that the land was "vacant" was not intended as a denial of Indian occupancy, but merely *to show that the recognized proprietor* exercising dominion and control over the main tract of land waived all protest against its being granted; that is, as to him, it was vacant and abandoned. The sole purpose of the petition addressed to the prefect and to the priest in charge of the mission was to obtain their consent to the grant being made—a waiver of the mission's rights to the property: nothing more. The language in this case is the "'Valle San Jose' is vacant and abandoned without any goods nor cultivation on the part of San Diego, but said place belongs at the present time to said mission;" that is, it was "vacant and abandoned * * * on the part of San Diego" (Mission), "but * * * belongs to said mission." The scope and purpose of this report was evidently merely to show that as to the then proprietor—the Mission San Diego—the land was vacant and abandoned, but it can not be considered as in any way a report that no Indians were occupying the land. The language used is "vacant and abandoned * * * on the part of San Diego" (Mission), not *vacant and abandoned on the part of the Indians.*

We submit, however, that it was not proper for the court to invoke against the defendants an estoppel, based upon evidence which it held was properly excluded, and therefore not in the case. If the expediente containing the report of the prefect was under

the ruling not in evidence, its contents can not be invoked as an estoppel to prevent defendants showing they were in possession when the Warner grant was made.

(*c*) BUT EVEN IF THE WORDS "VACANT AND ABANDONED" COULD BE CONSIDERED AS REFERRING TO THE INDIAN OCCUPANCY, THE REPORT DID NOT OPERATE AS AN ADJUDICATION CONCLUDING THE INDIANS, BUT MERELY AS EVIDENCE, AND IS SUBJECT TO BE OVERCOME—AND HAS BEEN OVERCOME—BY BETTER EVIDENCE.

The report of the prefect that the lands were "vacant and abandoned," even if applicable to the Indians, is not entitled to the dignity of *an adjudication*. It was not rendered in a judicial proceeding, but was a mere ministerial act of the officer, and is not conclusive so as to preclude the contrary from being shown. At best it is but evidence, and that of a very inferior character. Its sole purpose was to enlighten the governor and departmental assembly as to the local conditions, and primarily to assure such authorities that there were no impediments in the way of the grant so far as the legal or fee simple title was concerned. It was entirely unnecessary to mention the fact of the Indian possession, as under the general law of the land such possession was not prejudiced by grants to individuals, as by the force and effect of the general law—and without the necessity of a specific reservation in the grant—the possessory rights of the Indians were protected; and, furthermore, it was customary to preserve all existing

"usages" in the grants by stating that the grantee should not interfere with the "servidumbres." Hence, it was not essential or important to refer to the possession of the Indians in such reports. Yet so solicitous were the Mission authorities for the welfare of the Indians, that it was the common practice for them, in giving their consent to the granting of Mission lands, to refer to the fact of Indian possession where it existed, and to provide that the grant should be without prejudice to the Indians' continued right to use and occupancy, and the fact that such was not done in this case—as we expect to show in the next subdivision of this argument—was because there were no Indians on the lands referred to in the report in question, as such land did not include the property here in controversy, but only included land within the jurisdiction of, and owned by the San Diego Mission, and such jurisdiction and ownership did not extend over these lands, but these lands were upon another tract of land known by a different name, within the jurisdiction of, and owned by a different mission, and four years before had been granted to another party, whose grant was still recognized as valid, and which specifically reserved and protected the rights of the Indians.

(*d*) THE EVIDENCE UNMISTAKABLY SHOWS THAT THE TRACT OF LAND TO WHICH SUCH INVESTIGATIONS AND REPORTS APPLIED DID NOT COVER THE TRACTS IN CONTROVERSY HERE, AND THEREFORE CAN NOT BE CONCLUSIVE AS TO THE POSSESSION OF THESE TRACTS.

Under this heading we have combined our argument in support of this proposition, with our argument upholding our next point:

(*e*) THAT PLAINTIFFS' TITLE TO THE LAND HERE IN CONTROVERSY RESTS ENTIRELY UPON THE GRANT TO PICO OF THE "AGUA CALIENTE," WHICH EXPRESSLY PRESERVED THE RIGHTS OF THE INDIANS, AND NOT UPON THE LATER GRANT TO WARNER.

A careful study of the record in this case shows that the place designated in the Warner expediente as "Valle de San Jose," was a separate and distinct tract of land from that designated as "Agua Caliente" in the Pico grant, and that the "Valle de San Jose" was exclusively under the jurisdiction of, and the property of the San Diego Mission; and that the "Agua Caliente" was exclusively under the jurisdiction of, and the property of the San Luis Rey Mission, and that the officers reporting on Warner's petition as to the condition of the "Valle de San Jose" land were acting on behalf of the San Diego Mission, and not on behalf of the San Luis Rey Mission, and were confining their report to the "Valle de San Jose" (upon which it is even now conceded that there never were any Indians), and that they were not attempting to pass upon the condition of the "Agua Caliente" tract, which was not within their jurisdiction, and which was admittedly, as shown by all the testimony, occupied by Indians. Hence, it must be apparent that their findings that the "Valle de San Jose" was "vacant and abandoned" in no way operated as an

adjudication, or even a report, that there were no Indians occupying the "Agua Caliente" tract, an entirely separate and distinct tract, which embraced all of the Indian villages in controversy in this action.

We submit that all of these matters are clearly established by the record in this case, as we shall now attempt to demonstrate:

That the "Valle de San Jose" and the "Agua Caliente" were separate tracts, the former being under the jurisdiction of the San Diego Mission and the latter under the jurisdiction of the San Luis Rey Mission, see testimony of J. J. Warner, Tr., pp. 46–47, where, referring to his petition addressed to the Mexican authorities asking for a grant of the "Valle de San Jose," he says: "You see here is Agua Caliente and there is El Valle del San Jose. *Now, El Valle del San Jose, so far as the Mission of San Diego is concerned, had no connection with the Agua Caliente.* When I wrote that petition I was referring to the southern half of the San Jose Valley. That is a geographical piece of land. * * * I was alluding to the Valle de San Jose in my papers addressed to the parties in charge of the San Diego Mission. About two-fifths of the valley, the southern part of it, had been occupied by the San Diego Mission. *The Agua Caliente village, however, is in the northern part of the valley, and was not included within the San Diego Mission jurisdiction.*" Nowhere in the Warner expediente is the name of the tract "Agua Caliente" used, but the tract in

question is always described as the "Valle de San Jose," and in all such documents it is alleged to be owned by or the property of the Mission of San Diego. The Warner expediente is headed "Expediente forwarded by the naturalized citizen Juan J. Warner, in petition for the place known as '*Valle San Jose.*'" (See Tr., p. 24.) Warner describes it in his petition as "Valle San Jose." The papers commented on by the California supreme court, in this case, as an investigation and report by the Mexican officials which disclosed the lands to be vacant, are the reports of Father Vincent Olivas and Juan Marron. (See Tr., p. 25.) To appreciate the scope and effect of these reports they must be read in connection with the communications of Warner, to which they are responsive. These two replies coming from San Diego officials—one the prefect and the other a priest in charge of the San Diego Mission—which declare the property therein described to be vacant, are taken by the California supreme court as conclusive that there were then no Indians on the "Agua Caliente" tract at the "Agua Caliente" village. When it is borne in mind that Warner's communications, to which these reports are responsive (Tr., pp. 24–25), describe the land as "Valle San Jose," "formerly occupied by the Mission of San Diego," and that both of the replies describe it as "Valle de San Jose" and as "belonging to the San Diego Mission," and when this is taken in connection with Warner's testimony that in his papers addressed to these parties *he was only alluding to the*

southern part of the valley, which had been occupied by the San Diego Mission, and that the San Diego Mission had no jurisdiction whatever over the Agua Caliente village on the northern portion of the ranch, and that they were two separate and distinct tracts (Tr., p. 47), it would seem conclusive *that such reports could not be deemed applicable to the possession or occupancy of another and distinct piece of property from that named*, viz, to the "Agua Caliente" located in another jurisdiction, known by a different name, and largely occupied by Indians, and in no way referred to in the communications to which such reports are responsive.

The grant to Warner itself described the lands as "Valle de San Jose" and must, of course, be considered as based upon the reports of the San Diego local officials, which, according to Warner's own testimony in this case (Tr., pp. 46–47), were referring only to "the southern part of the valley which had been occupied by the San Diego Mission" and not to the Agua Caliente village which is "in the northern part of the valley and was not included within the San Diego Mission jurisdiction." It is a significant fact that the "plan" or "deseno" describing the property covered by the Warner grant as taking in the whole valley, including the Agua Caliente, was never presented by the petitioner until many months after the local officials had rendered their reports approving the petition and reporting the lands to be vacant; and for many months after the grant had been actually made by the governor, the grant being made November 14, 1844, and

the "plan of the property" furnished for the first time May 12, 1845. (See Tr., pp. 26, 27.) It is thus apparent that it was not brought to the attention either of the local authorities or of the governor that any land was sought other than that known as "Valle de San Jose," which was within the jurisdiction, and the property of the San Diego Mission; nor was it brought to the attention of such authorities or to the governor, that the petitioner was seeking title to any land that was used or occupied by Indians (it being conceded that there were no Indians upon the "Valle de San Jose" owned by and included within the jurisdiction of the San Diego Mission); and this fact alone accounts for the absence of the usual special clause protective of the rights of the Indians, which was uniformly inserted in Mexican grants where it was known to the officials that Indians were in possession. Upon Warner's furnishing his plan of the property—some six months after the governor's action granting his petition—the fact was made to appear for the first time that Warner was attempting to cover the entire valley, including the "Agua Caliente," which latter tract was entirely within the jurisdiction of the San Luis Rey Mission, and which, under the Spanish and Mexican law, could not have been granted to Warner except by first procuring the approval of the authorities of the San Luis Rey Mission, which was never done.

That even Warner himself did not consider his grant good, as to the "Agua Caliente," is shown by the fact

that he subsequently procured a deed from Jose Antonio Pico for the Agua Caliente grant which Pico had received from the Mexican Government in 1840. And when Warner presented his claim to the Board of Land Commissioners for confirmation he relied upon both grants, and designated the lands which he claimed as "Valle de San Jose *and Agua Caliente*." The following extract from his petition to the Board of Land Commissioners explains his own interpretation of his rights in the premises: "The petition of J. J. Warner respectfully represents that he claims, by virtue of *grants* from the Mexican nation, a tract of land in the county of San Diego, in said State, known as the Valle de San Jose and Agua Caliente [note, not merely Valle de San Jose], as the same is described in the *grants* thereof and in the accompanying maps and *desenos; that so much of said land as is known as 'Agua Caliente' was on the 8th day of June, 1840, granted to Jose Antonio Pico by Juan B. Alvarado*, governor of California, and authorized to grant lands in the name and on behalf of the Mexican nation; *and the same has since become vested in the present claimant. That the remainder of said tract was subsequently granted to this claimant by a decree of concession made on the 2d day of September, 1844, by Manuel Micheltoreno*," etc. The petition further states that copies of the Pico and Warner grants were attached, and concludes by saying that "the claimant relies on the above-mentioned documentary evidence and will produce other proof should it be required by the board." It transpires in subsequent

litigation between Pico and Warner, years later, reported in 73 Cal., 17 (the case referred to in the opinion of this court), that Warner, instead of being the absolute owner of the Pico grant to the Agua Caliente, at the time of presenting his claim to the Board of Land Commissioners, only held a deed which was intended as a power of attorney, and was merely representing Pico for the purpose of having his claim confirmed. In such subsequent litigation with Pico, who sought to hold Warner as a trustee of the Agua Caliente portion of the property, Warner, it seems, succeeded in establishing to the satisfaction of the superior court that he had not taken advantage of his agency in a way that would charge him as a trustee; but, however this may be, the record before the land commission clearly shows that he claimed to be the *owner* of the Pico grant, and not the *agent* therefor, and evidently he satisfied the Board of Land Commissioners to that effect, as the opinion says: "If, however, there were any remaining interest in said Pico by virtue of the grant to him, the present claimant has succeeded to that interest by virtue of a conveyance made to him by said Pico on the 13th day of January, 1852. This conveyance is given in evidence." (Tr., p. 55.) How the superior court in the case of Pico against Warner could have failed to see that Warner's position as attorney in fact for Pico, on the one hand, and as a representative of his own conflicting interests, before the land commission, was utterly repugnant to the laws governing principal and agent, and that such interests were in

irreconcilable hostility to each other, does not appear. But, however that may be, in this conflict between Warner's self-interest, which dictated that he should extend his own grant over the entire valley, and the interest of Pico, which dictated that all that portion of the valley known as Agua Caliente should be confirmed to Pico, we may be able to account for the fact that Warner did not, in his petition to the Board of Land Commissioners, disclose that he was a mere agent for the Pico grant, but claimed to be its owner. Self-interest may have caused him to conceal the conflict of interest between himself and Pico, which, had it been apparent to the Board of Land Commissioners, would have unfitted and disqualified him for the responsible position of properly prosecuting Pico's case before that tribunal. And this same self-interest may throw some side light on the fact that the impression was created before the board that Pico had possibly abandoned his grant; and this same self-interest may have helped to make it "manifest that the grant to Warner embraced the premises described in the previous grant to Pico," as stated in the opinion of the Board of Land Commissioners; but that even if this was not so, it was not very material, as he had acquired all of the Pico title to the Agua Caliente grant. During the two years between the filing of Warner's petition and the decision of the commission confirming his claim Warner had much time to consider what might be the effect of a decree following the language of his petition and holding

that his claim was based upon *two grants* from the Mexican Government, and that "so much thereof as was known as Agua Caliente was granted to Antonio Pico * * * and had since become vested in the present claimant, and that the *remainder* of said tract was subsequently granted to the present claimant," etc. Such a decree would have been an adjudication that Warner could not have easily evaded in subsequently accounting to Pico. Had such a decree been entered, he could not have said that, without any fault of his, Pico's grant was rejected and Warner's confirmed for the whole valley, and hence he held nothing in trust for Pico. By having himself appointed Pico's agent regarding the Agua Caliente grant, he thereby acquired the power of preventing Pico from contesting his right to float his junior grant over the senior grant to Pico, and it can not be told to what extent this contributed to weakening the showing before the board as to Pico's grant and to strengthening the showing as to his own grant. But, however that may be, he was evidently not guarding himself against the fact of Indian possession of the "Agua Caliente" lands while before the board of land commissioners, as all the evidence there given shows the Indians to have been in possession of the "Agua Caliente" village from the time of the earliest knowledge of the witnesses. We do not mean to concede, by what has been said, that the Pico grant was rejected by the Board of Land Commissioners and the Warner grant alone confirmed, but we insist that in view of the contents of Warner's

own petition before the board, his own pleading in that proceeding,—which alleged his *claim* to be based on two grants from the Mexican nation, "*that so much as is known as Agua Caliente was granted to Pico and has since become vested in the present claimant;* that the *remainder* of said tract was subsequently granted to this claimant," etc.,—*he and his successors in interest are estopped from asserting the contrary;* and that they can not be relieved therefrom by the fact that the decrees of the board and the district court used the word "grant" in the singular and not the word "grants," for it is also "adjudged by the commission that the *claim* of the land petitioned is valid and it is therefore decreed that the same is confirmed." What this "claim" was can be found by referring to the petition, which showed it was based on the two grants, the "Agua Caliente" portion to Pico, the "*remainder*" to Warner. Such was evidently the construction placed upon the decrees by the land department in issuing the patent, for the patent recites that such claim is "founded on *two* Mexican grants, the first made on the 8th day of June, A. D. 1840, to Jose Antonio Pico by Juan B. Alvarado * * * the second made on the 28th day of November, A. D. 1844, to Juan Jose Warner by Manuel Micheltoreno."

We have alluded to this agency of Warner for Pico, and to the conduct between Warner's *interest* as owner, and his *duty* as agent, merely as tending to explain why the commission may have been led to go out of its way, in a matter utterly immaterial to the United States, to contradict Warner's position as to the bound-

aries of his own grant, by expanding them so as to swallow up the Pico grant, and as explaining how there might be a *shortage of evidence* as to Pico's compliance with the terms and conditions of his grant, and a *superabundance of evidence* as to Warner's having complied with the terms of his grant.

Our position is that this senior grant to Pico is—in so far as the Indians are concerned—binding and effective, and never was abandoned, and that plaintiff's title rests upon said grant, in so far as the property here in controversy is concerned, and that it does not rest upon the later grant to Warner as to such property. We think this clearly appears, notwithstanding the language of Commissioner Felch in the opinion of the board of land commissioners relied upon by plaintiffs (see Tr., pp. 54–55). It will be noticed that the decree of the Board of Land Commissioners itself does not perpetuate the statement contained in the opinion as to the rights of the claimant depending entirely upon the later grant to Warner, or as to the Pico grant having been abandoned. Warner appeared by his petition to have acquired all the interest of Pico under the Agua Caliente grant of 1840, *and it did not become a contested fact before the land commission as to whether his rights were derived from the first or second grant. That was not the question in issue.* The proceeding was merely between Warner and the United States. It was immaterial to Warner (except in an effort that might be made by him later to escape his liability to account to Pico as a trustee), and likewise immaterial

to the United States, whether the commission found that Warner was entitled to the property covered by his petition by virtue of both grants or only one. He was only interested in having the entire property confirmed to him, regardless of the superiority or the inferiority of the respective grants under which he claimed (except as to the effect such an adjudication would have upon his subsequent settlement with Pico, of which the commission was not then aware); but that he did claim under and relied upon *both grants* is evident from the language of his petition to the Board of Land Commissioners, and it was unnecessary for the board to determine upon which grant his rights were based. This is shown from the following language of the opinion of the board, viz: "If, however, there was any remaining interest in said Pico by virtue of the grant to him, the present claimant has succeeded to that interest by virtue of a conveyance made to him by said Pico on the 13th day of January, 1852. This conveyance is given in evidence." And in confirmation of this theory, that plaintiffs' title is based upon both grants and not upon the latter grant, the patent from the United States to Warner recites that it is founded upon both grants, giving their respective dates and the names of the respective grantees. This recital absolutely estops plaintiffs, as the successor in interest of Warner, the patentee, from claiming the contrary, as recitals in patents based on Mexican grants bind all parties claiming thereunder.

See *McGarrahan* v. *New Idria Mining Co.* (49 Cal., 335).

It is a settled rule of evidence that the recitals in

deeds, patents and conveyances of a similar nature are binding upon the parties thereto and their privies in estate, in blood, and in law, but are not binding upon strangers or persons who claim by title paramount.

See Best on Evidence, vol. 2, sec. 542; Phillips on Evidence (Cowan Hills & Edwin's notes, vol. 1, page 473, note 130); Id., vol. 2, page 574, note 476; see also note, *Graff* v. *Castleman* (16 Am. Dec., 754).

The fact that the grant to Pico was a valid, binding grant; that there was never any judicial abandonment or forfeiture of the same declared under the Mexican Government or any such adjudication by any tribunal of this Government having jurisdiction of the matter properly before it in a *contested* case, and the fact that Warner acquired the rights that passed by the Pico grant, and in his petition before the land commission relied upon such grant, and the further fact of the recitals in the patent itself that the title was based upon both the Pico and the Warner grants, when taken together, far outweigh the single statement of one of the land commissioners that, in his opinion, the Warner claim must rest entirely upon the grant to Warner; especially so when Warner's motives for having the Pico grant ignored and his own grant approved are taken into consideration; nor does the adjudication in *Pico* v. *Warner* (73 Cal., 17), cited by the court, in the opinion in this case operate as an adjudication in favor of plaintiffs' claim as against defendants here, for the reason that *defendants were not parties to such adjudication nor bound by it.* We therefore contend that it clearly appears

from the evidence introduced and rejected in this case that plaintiffs' title to the property in controversy here, is based upon the grant to Pico, which specifically reserves the Indian rights, and not upon the later grant to Warner, which only reserves the defendants' rights by reserving all existing "servidumbres." In coming to this conclusion, it is important to remember that no mention whatever is made in Warner's expediente about his claim covering any portion of the grant formerly made to Pico, nor is any reference made to Pico's abandonment, nor does it appear that the Pico grant was by the Mexican authorities declared forfeited or lapsed, as an adjudication precedent to the grant to Warner, which certainly would have been done if the authorities had been apprised of the fact that they were to grant land covered by the former grant to Pico. And in this connection it will be borne in mind that no "juridical possession" of the Warner grant was ever given by the Mexican authorities which would call to their mind the boundaries for which Warner was contending. The property is, in every document in the Warner expediente, stated to be owned by the Mission of San Diego, whereas the undisputed evidence, both oral and documentary, in this case shows that all the property covered by the Pico grant was owned by and subject to the jurisdiction of the San Luis Rey Mission. These facts taken together, we think, fully sustain our conclusion that the Mexican Government did not intend to grant to Warner the premises covered by the prior grant to Pico, and further shows that Warner did not

believe that by his grant he had acquired Pico's rights. Otherwise he would not have thereafter taken deed from Pico, and, before the land commission, claimed that his title rested upon the Pico grants as to that portion of the land known as the Agua Caliente, and upon his own grant as to the "*remainder*."

That the lands covered by the grant to Pico of 1840 were known as "Agua Caliente" and were entirely within the jurisdiction of the San Luis Rey Mission, were the property of such mission, and included the property here in controversy, that such lands were in the possession of the Indians when such grant was made, and that both the grant and all the preliminary papers and proceedings leading thereto, provided that the grantee should not molest the Indians established thereon, appears beyond all question from the various papers in the Pico expediente. (See Tr., pp. 28, 29, 30.) We ask the court's careful examination of these papers. The testimony before the land commission clearly showed that the Mission Indians were in possession of the Agua Caliente from a time prior to the grant to Pico. See especially the testimony of John Foster as follows:

> I am acquainted with the ranch called Agua Caliente in San Diego. * * * I passed over the ranch in 1833; the Indians were in possession at that time and have been in possession ever since that time. The Indians had never been expelled from there that I know of. The next thing I knew Antonio Pico was in possession, as I understood, by a grant from the Government. The Indians I have referred to

> as occupying the ranch were Mission Indians. The same Indians were in the employ of Antonio Pico about 1840. * * * Pico's agent occupied the ranch until the lands were transferred, as I understand, to Juan Warner. * * * As a general thing the grants were made with the condition that the Indians be permitted to remain there. The Mission Indians to whom I have referred were the only Indians established on the lands.

Jose Maria Avilla testifies that he knew the Agua Caliente in 1838. He says: "At that time there were Indians living at the Agua Caliente. These Indians were under the administration of the San Luis Rey Mission. Families and small ones, there were more or less than three hundred. I saw these Indians again in 1846. They were living there permanently in houses."

Pio Pico testified:

> I know the Agua Caliente Indian village and Warner's ranch in San Diego County. First knew it in 1820. There were Indians residing there then. Such Indians were subject to the administration of the San Luis Rey Mission. I was administrator of that mission in 1835, up to 1840. I was not at Agua Caliente from 1820 to 1835. There were many Indians at Agua Caliente while I was administrator of the San Luis Rey Mission; maybe more than one hundred. While I was administrator of the mission I had a foreman at the Agua Caliente village. He took up oxen there and put in seeds on their farms, plowed for them, and made a granary. The Indians lived there and worked under

the charge of the foreman. I know nothing about the place after the mission jurisdiction ceased, having never been there since 1840.

J. J. Warner, the grantee and patentee of the ranch, says that these Indians "had been under the control of the San Luis Rey Mission. * * * These Indians were never dispossessed from their place at Agua Caliente that I ever heard of from 1843 until the time I left there (1851)." If they had been dispossessed Warner certainly would have known of it. This of itself is ample refutation of the statement that the land was "vacant" in the prefect's report, if that could be considered as referring to Indian occupancy and as applying to these lands. In addition to this testimony nearly a score of the defendants swore that they were old Mission Indians living at Agua Caliente, and that such Indian village was formerly under the charge of the San Luis Rey Mission before Warner came upon the ranch, and that they were in possession of the land and used the Agua Caliente lands surrounding the Agua Caliente village ever since they were born (and many of them were grown men and women when Warner came on the ranch), and that the Indians had lived there and cultivated and used their lands ever since.

From all this evidence, both oral and documentary, we submit that it unquestionably follows:

1. That the report of the prefect forming a part of the Warner expediente, to the effect that the "Valle de San Jose," the property of the Mission of San Diego, was "vacant and abandoned," could not possibly

operate as an adjudication that no Indians were occupying the land here in controversy—an entirely different piece of land, which was upon the "Agua Caliente tract," within the jurisdiction of and formerly the property of the San Luis Rey Mission, but then owned by Jose Antonio Pico, under a grant made four years before, which specifically provided that the Indians established thereon should not be molested; and certainly the Board of Land Commissioners can not be considered as having found that there were no Indians in possession when either of the grants were made, for there is no finding upon that subject whatever, and the undisputed evidence before the board conclusively shows the Indians were in possession of the Agua Caliente when *both grants* were made.

It therefore follows that there was no adjudication by the Mexican Government that *these* lands were vacant or that no Indians were in possession when the grant to Warner was made, and hence we are not precluded on that ground from showing such Indian possession by proper evidence.

The evidence examined also clearly shows—

2. That the grant of 1840 to Jose Antonio Pico of the Agua Caliente was regular and valid in all respects, and included the lands here in controversy, and showed Mission Indians to be in possession and specifically provided that their right of possession should not be prejudiced; that this grant was never treated as lapsed or abandoned by the Mexican authorities, and that the land was never granted to any one else; that Warner

treated it as valid by subsequently obtaining deed of it from Pico, and that thereafter he presented to the Board of Land Commissioners a petition asking confirmation of his claim to a tract of land known as "Valle de San Jose and Agua Caliente," and stated "that so much of said land as is known as *Agua Caliente* was on the 8th day of June, 1840, granted to Jose Antonio Pico, and had since become vested in Warner" (never even hinting that it had been forfeited, lapsed, had been abandoned, or possessed any other defect), "and that the *remainder* of said tract" was granted to Warner in 1844 (never claiming that there was any conflict or overlapping between the two grants, or that his included the Pico grant, but clearly alleging the contrary by confining *his grant* to the "*remainder*" of said tract), and stating that his claim for confirmation of title to the land was based upon such *two* grants.

His "*claim*" was confirmed and patented, and the patent recites that it is founded *both* upon the Pico and Warner grants. There was no issue or contest between the grants before the commission, as they appeared to be both vested in Warner, and if the whole body of land was confirmed to him the exact amount derived from each source became unimportant, and was evidently considered so by the board and court, and the use of the word "grant" instead of "grants" in the decrees therefore becomes insignificant. There was no controversy on the subject, and the result was alike immaterial both to the United States and to Warner. It must therefore be conceded that Warner and his

successors are estopped from denying that "so much of said land as is known as the 'Agua Caliente' was granted to Jose Antonio Pico," whose grant by its express language reserved the right of the Indians; and we therefore submit that this case in that respect is identical with and can not be distinguished from *Byrne* v. *Alas*.

From the foregoing analysis of the testimony, we submit that it is clear:

First. That this case can not be distinguished from *Byrne* v. *Alas* in so far as the report of the prefect on the San Jose tract that it was "*vacant*" is concerned, as the grant there involved did likewise.

Second. That the words "vacant and abandoned" used in such report refer only to the occupancy of the proprietor of that tract, the San Diego Mission, and not to the Indian occupancy on the other tract, "Agua Caliente," under the other mission, viz, San Luis Rey.

Third. Even if these words be considered as referring to Indian occupancy, the report did not operate as an *adjudication* concluding the Indians, but at best was only in the nature of evidence, and subject to be overcome by better evidence, and has been completely disproven by the evidence in this case.

Fourth. The evidence unmistakably shows that such investigation and report referred to a tract of land entirely distinct from the tracts here in controversy, and therefore has no bearing as to the possession of these tracts, either as an adjudication or as evidence.

Fifth. That plaintiffs' title rests upon the senior grant of 1840 to Jose Antonio Pico, which by express

language provides that the grant should not prejudice the rights of the Indians that thereon may be established, making this case identical with *Byrne* v. *Alas* in that respect.

Fifth.

THERE HAS NEVER BEEN ANY DECISION OF THE LAND COMMISSIONERS, OR OF ANY OTHER OFFICERS OF THE UNITED STATES, HOLDING, EITHER "IN EFFECT" OR DIRECTLY, "THAT THE LAND IN QUESTION WAS VACANT AND SUBJECT TO ABSOLUTE ALIENATION," SO AS TO CONCLUDE THE THIRD PERSONS REFERRED TO IN THE ACT OF MARCH 3, 1851; AND THAT HAD SUCH COMMISSIONERS AND OFFICERS SO HELD, SUCH HOLDING WOULD NOT BE BINDING UPON "THIRD PERSONS," AS SUCH TERM IS USED IN THAT ACT.

In support of this position we refer to the opinion and decree of the Board of Land Commissioners and the decree of the district court, which do not hold or find that the land is "vacant" or subject to "absolute" alienation. The decree of the board merely holds that "the claim of the land petitioned is valid, and it is therefore decreed that the same be confirmed." Both decrees are utterly silent as to the land being "vacant" or as to the "absoluteness" of the title confirmed, as these were matters with which the commission and the court were not concerned, for the statute under which such tribunals were acting provided that their decrees should "be conclusive between the United States and said claimants only, and shall not affect the interests of third persons." Such tribunals were, therefore, interested only in determining the title as between the

United States and the claimant and all parties claiming under the Government by titles subsequent, and *the language of the statute to that effect must be read into each decree.* So well understood was this that all patents issued in pursuance of such decrees contained such a provision. See the patent here (p. 37 of the transcript), which provides "that in virtue of the fifteenth section of the said act *neither the confirmation of this said claim nor this patent shall affect the interests of third persons.*"

It must be apparent from the foregoing that there is no finding of the commission, or the district court, or of the Land Office, either directly or "in effect," that the land is "vacant" or that it is subject to "absolute" alienation. But had such a finding been made and even perpetuated in the patent it would not have concluded those who were third persons under the fifteenth section of the act of March 3, 1851. The position that the patent is conclusive against such persons upon such matters is untenable.

In its fullest sense it is not even true as to ordinary patents in which the title was *originally conceded to be in the United States*, except as to *contested questions of fact* in issue before the Land Office, in the progress of proceedings for the issue of patents, and even then is not conclusive as against fraud, *mistake, or misconstruction of the law*, and certainly it is not true, and has never been held to be true, as to lands *covered by Mexican grants, to which the United States never asserted title*, and as to patents that do not purport to bind anyone but

the *patentee, the United States, and parties claiming under the United States by title subsequent.*

No authority can be produced to refute this proposition. The books are full of authorities holding that in a suit *at law* a patent of the United States can not be collaterally attacked where the title was conceded to be in the United States at the time the patent was issued, and the officers issuing the patent acted within the scope of their jurisdiction. In such cases by law a decision of the Land Department on all contested questions of fact is—in the absence of fraud or misconstruction of the law—made conclusive upon all the world; whereas, by the act of March 3, 1851, an entirely different rule is established as to the parties other than the claimant, the United States, and those claiming under the United States by title subsequent. In other words, *such act makes a special exception as to the conclusiveness of patents issued thereunder in favor of parties holding by title anterior and paramount to that confirmed and patented.*

The undisputed testimony before the Board of Land Commissioners upon the confirmation of the grants upon which plaintiffs here rely (see Tr., pp. 33–34) shows that the Indians were in possession of the land here claimed and that the same was not vacant; and there is no finding of the commission or court to the contrary; but had there been such a finding, it would not have affected the rights of "third persons" preserved by the statute, nor precluded such parties so in possession from afterwards showing the fact of their

possession. In this respect proceedings under the act differ vitally from proceedings had in the land office in ordinary cases for disposing of land, title to which was admittedly in the United States Government. In such a case, a finding of the land office that the lands to be granted were vacant lands, and such as could be granted, would be conclusive as against *all parties*, and the whole world would thereafter be estopped from proving the contrary. The reason of this is that such proceedings were intended to be final, binding, and conclusive as to *everyone;* whereas, under the provisions of the act of March 3, 1851, proceedings had thereunder *were not intended to bind parties asserting valid conflicting claims to the property by title paramount and anterior to that confirmed.* All the cases, both State and Federal, hold this.

Sixth.

DEFENDANTS' RIGHTS WERE PRESERVED BY VIRTUE OF THE SIXTEENTH SECTION OF THE ACT OF CONGRESS OF MARCH 3, 1851, EVEN THOUGH THEY WERE NOT SUCH "THIRD PERSONS" AS WERE PROTECTED BY THE TERMS OF SECTION 15 OF SUCH ACT.

In this connection we merely call the court's attention to the language contained in *Byrne* v. *Alas*, as follows, where it is said:

> Furthermore, section 16 of the act of Congress of March 3, 1851, provides that "it shall be the duty of the commissioners herein provided for, to ascertain and report to the Secretary of the Interior the tenure by which the

mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind; also those which are occupied and cultivated by Pueblo and Rancheros Indians."

This language indicates that Congress did not intend that the rights of the Indians should be cut off by failure on their part to present their claims, but that it should be the duty of the commissioners to ascertain and report the tenure by which they held their lands. And this is in harmony with the argument made in their behalf by Mr. Jones.

Independent of all that has been said in this brief on the subject of these defendants being such "third persons" as were not bound to present their claims to the Board of Land Commissioners for confirmation, and independent of the provision of the act itself protecting the rights of such third persons, we feel that we would be safe in relying entirely upon section 16 of such act above quoted, as relieving these defendants from all necessity of presenting their claims to the board. Under the Spanish and Mexican Governments, these Indians were treated as wards of the Government, and such Governments regarded themselves as their special guardians. Being wards of the former nation, by the change of sovereignty they became wards of this nation, and being such they were not charged with knowing there was a land commission, or required to present their claims to it, or even chargeable with knowledge of the law generally.

And knowing their helpless condition and their inability to protect and preserve their own rights and titles at the time of the transfer of sovereignty, it was but natural that some such clause as section 16 should have been inserted in this act, so that the duty devolving upon the ordinary claimant of presenting his claims and making his proof of title, should, in the instance of the Indians, be shifted upon the shoulders of the land commissioners themselves; and the failure of such commissioners to perform their duty in the premises, if they did fail, can not be invoked as a ground for forfeiture of the rights of the Indians. It is to be presumed that the nation has always recognized and protected these customary rights of its wards.

Seventh.

THE DEFENDANTS HAVE ACQUIRED A PRESCRIPTIVE RIGHT TO THE USE OF THESE LANDS.

The evidence shows that patent issued in 1880 and suit was not brought until 1892, twelve years later.

This prescriptive right is pleaded in the answer (see Tr., pp. 6, 9, and 11), and is fully sustained by the testimony, provided the payment of taxes is not a prerequisite to obtaining the right by prescription to the easement, servitude, or usufruct claimed by these defendants.

The defendants here are not claiming *title* to the *lands* in controversy, but merely a usufructuary interest, an incorporeal hereditament or servitude in gross, such as is referred to by the court in *Smith* v. *Cooley* (65 Cal., 46, 49) in treating of a mining right, as follows:

> This particular estate, or incorporeal hereditament, is what is known in law as a servitude in gross, or a personal servitude imposed upon land for the benefit of the person or persons owning the right, irrespective of the ownership of the land. The right is usufructuary in its nature and character, and entitles the owner to the use of the land for the profits which may be derived from its rents or from quarrying and digging in it for ores or from harvesting its fruits, crops, vintages, etc.

So of an Indian claim of use and occupancy. It is a servitude in gross, usufructuary in its nature—originating in the original possession of the territory by the ancestors of these very people—validated by the successive decrees, acts of parliaments, or other legislative bodies of Spain and Mexico. As an easement or servitude in gross or usufructuary interest it is not such a claim of title to land as is contemplated by section 325 of the Code of Civil Procedure of California, making payment of taxes levied and assessed on land a prerequisite to a right by prescription or adverse possession. The provision of the California code requiring payment of taxes as an element in acquiring title by adverse possession reads as follows: "Provided, however, that in no case shall adverse-possession be considered established, under the provisions of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for a period of five years continuously and the party

or persons, their predecessors, and grantors have paid all the taxes, State, county, or municipal, which have been levied or assessed upon such land."

See sec. 325, Cal. Code of Civil Procedure.

That this section has no application to a mere usufructuary right or easement, see *Frederick* v. *Dickey* (91 Cal., 358), where it is said:

> So the payment of taxes is necessary to the successful assertion of title as provided now by statute, *but that requirement does not apply to a mere easement*, which is not separately assessed for the purpose of taxation.

The property rights claimed by defendants are property of "Indians not taxed," as referred to in the Constitution of the United States and of California, and the presumption is that the assessor, knowing the law, did not tax the Indian right of use and occupancy, for, as said in *Coonradt* v. *Hill* (79 Cal., 587, 593), "In the absence of testimony it is presumed that the advantages and disadvantages * * * have been considered in assessing the land," and that hence—the assessor realizing that the value of plaintiffs' interest in these lands was largely diminished, owing to the Indian right of occupancy—this "disadvantage" was fully "considered in assessing the land" to plaintiffs, and that their assessment was correspondingly reduced. These are propositions to which we wish to call the court's attention as having a bearing upon the admitted fact that plaintiffs have paid all taxes that

have been levied and assessed on these lands since patent issued.

The plaintiffs in error in this action are not claiming the *title* to the *land* involved, but merely a usufructuary interest therein, and the finding that plaintiffs have paid all taxes, etc., "is answered by the fact that it does not appear that any taxes have ever been levied or assessed" upon the usufructuary interest in question to defendants or plaintiffs, "or to any person or persons known or unknown." *Heilbron* v. *Water Ditch Co.* (75 Cal., 117–123).

But even though the usufructuary rights of the Indians were assessed, and the taxes thereon paid by the plaintiffs, it is immaterial, as payment of taxes upon the same is not made a requisite of acquiring prescriptive title to such an incorporeal hereditament—all the other elements of adverse possession existing as they do here.

Eighth.

THIS COURT SHOULD, UPON THE RECORD BEFORE IT, DECIDE THE ENTIRE CONTROVERSY, BOTH AS TO THE LAW AND THE FACTS.

The decision of the trial court and of the California supreme court was based solely upon questions of law and not upon any conflict as to the facts. All of defendants' evidence was held to be inadmissible, and was stricken out as being immaterial over three years after the evidence was all in, and the case closed and submitted to the court. There is practically no controversy as to the facts, and there can be no doubt that

the evidence introduced, but afterwards stricken out, showed that the defendants and their ancestors were Mission Indians, and that they had been in the actual possession, use, and occupancy of the property in controversy since a time long prior to the inception of plaintiffs' title; and if the court shall hold with us that the testimony introduced by the defendants was *material*, and *was improperly stricken out, we ask that this court decide the entire controversy, both as to the law and the facts;* as the whole case is in the transcript and before the court, just as though the objections to the testimony offered by defendants had been overruled. The case presents the anomaly of having been decided entirely upon the law, yet of presenting all of the facts to which the law is applicable, so that the appellate court is not embarrassed by any findings upon conflicting facts, yet is able from the record made, to finally pass upon the effect and sufficiency of the facts. Our point is, that the case was as fully tried and presented on both sides in the trial court as if the evidence offered by the defendants were to remain permanently in the case—that is, it was tried by plaintiffs upon the theory that plaintiffs' objections to defendants' testimony might subsequently be overruled by the court—and therefore it can work no hardship upon the plaintiff—if the striking out of defendants' evidence was error—to have the entire case now passed upon as thus made. Defendants should not be put to the trouble and expense of a trial *de novo*, but are entitled to judgment *upon the case already made*, especially as many of the principal wit-

nesses for defendants—being very old men—have died since the case was tried, and if the case were sent back for decision of the trial court upon the case as made by the record, no advantage would follow from such a course, as the judge who tried the case is no longer on the bench, and the manner of the witnesses when on the stand could not be taken into consideration as an aid to a correct conclusion, and, furthermore, there is substantially no controversy as to the facts. We submit, therefore, in view of all of these considerations, that there is no advantage to anyone in having the facts passed upon by a local court, or any reason why, upon the record before it, this court can not do full and final justice to all, both upon the law and the facts.

CONCLUSIONS.

In conclusion, we submit that as we have shown there was no adjudication by the Mexican Government that these lands were not in the possession of Indians, we were not precluded from showing Indian possession; and as the evidence conclusively shows such possession from a time long prior to the grants under which plaintiffs claim, it follows that under the Spanish and Mexican law, independent of any reservations in the grants, the grantee acquired merely the legal title, subject to the continued right of use and occupancy in the Indians; and that here this right is preserved by the very language of plaintiffs' grants; that such right of use and occupancy, being a valid

right under the former sovereignty, it was not extinguished by the confirmation and patent to Warner; but such confirmation and patent merely established the legal title to be in Warner, just as before the change of sovereignty, but did not change the characteristics of his title so far as the Indians were concerned, but operated to relieve them of the necessity of presenting their claims for confirmation. But, independent of all other considerations, these defendants being wards of the nation, the provisions of the act of March 3, 1851, were not intended to be binding upon them, and this was recognized by making it the duty of the land commissioners to ascertain and report as to their titles.

That these defendants have acquired a prescriptive right to the use and occupancy of these lands by reason of their twelve years' adverse user subsequent to the issuing of the patent and prior to the bringing of this action.

We submit that upon the record here presented that the court should determine this entire controversy, both as to the law and the facts. We also ask that case No. 210, Quevas et al., plaintiffs in error, *v.* Harvey, be submitted upon the briefs and the arguments in this case.

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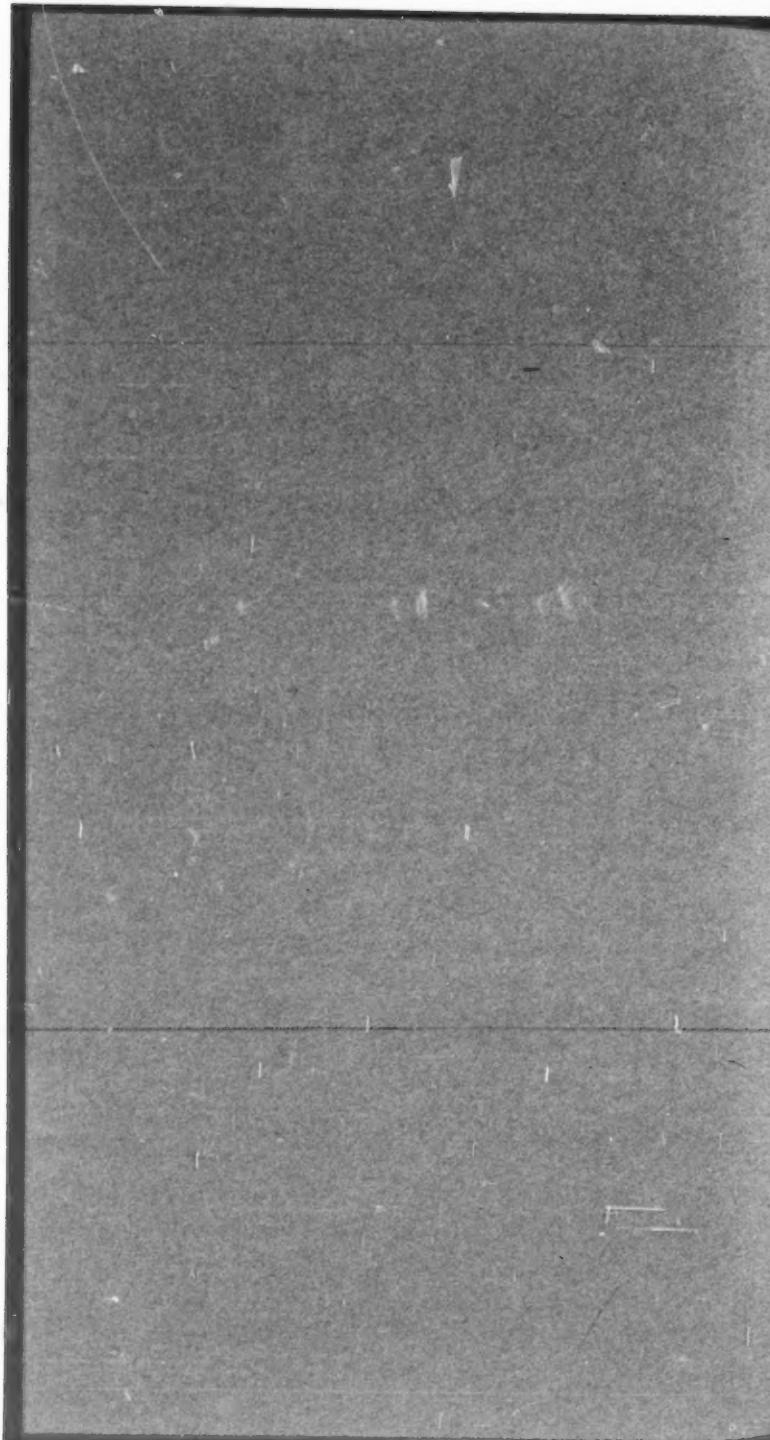
In the Supreme Court of the United States.

OCTOBER TERM, 1900.

JOSE QUEVAS ET AL., PLAINTIFFS IN ERROR,
v.
J. DOWNEY HARVEY, ADMINISTRATOR.
} No. 210.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE PLAINTIFFS IN ERROR.



In the Supreme Court of the United States.

OCTOBER TERM, 1900.

JOSE QUEVAS ET AL., PLAINTIFFS IN error,
v.
J. DOWNEY HARVEY, ADMINISTRATOR. } No. 210.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE PLAINTIFFS IN ERROR.

This case involves the same principles of law as are involved in the case of Allejandro Barker et al., plaintiffs in error, *v.* J. Downey Harvey, administrator, et al., being case No. 209 now pending in this court, and it is entirely unnecessary to repeat here all that has been said in the brief of plaintiffs in error in that case; and for that reason plaintiffs in error here ask leave to submit this cause upon the brief already filed, and such briefs as may be hereafter filed. The cases are practically identical, with this exception, that in this case the defendants do not claim that plaintiff derived title through a grant from the Mexican Government, which,

in specific words, mentioned and reserved the rights of the Indians therein *by name*, as is claimed to be the case in Barker *v.* Harvey; but defendants here concede that the Mexican grant, through which plaintiff derived title, does not *by name* reserve the Indians' rights, but that, nevertheless, such grant, by its *general language*, which provides that the grantee shall not interfere with the "usages" (*servidumbres*, Tr., page 29), does reserve such possessory rights of the Indians just as effectually as if their rights had been designated by name. With this slight difference the cases, as they present themselves in this court, are identical. Hence it is, plaintiffs in error here submit this case upon the brief in the Barker case.

Respectfully submitted.

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No. 209 & 210.

Sup. Ct. Brf. of Atty. Gen. (Ward) for P. C.

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ALLEJANDRO BARKER ET AL., PLAINTIFFS IN ERROR, v. J. DOWNEY HARVEY, ADMINISTRATOR, ET AL. — No. 209.

JESUS QUEVAS ET AL., PLAINTIFFS IN ERROR, v. J. DOWNEY HARVEY, ADMINISTRATOR. — No. 210.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

THE "MISSION INDIAN CASES."

SUPPLEMENTAL AND REPLY BRIEF FOR PLAINTIFFS IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

ALLEJANDRO BARKER ET AL., PLAINTIFFS in error, v. J. DOWNEY HARVEY, ADMINISTRATOR, ET AL. — No. 209.

JESUS QUEVAS ET AL., PLAINTIFFS IN ERROR, v. J. DOWNEY HARVEY, ADMINISTRATOR. — No. 210

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

THE "MISSION INDIAN CASES."

SUPPLEMENTAL AND REPLY BRIEF FOR PLAINTIFFS IN ERROR.

The main brief for plaintiffs in error covers fully the law of these cases, and, we contend, establishes our legal right on the strictest view of the principles and authorities applicable. Therefore we do not mean now to argue the technical issue anew, but shall in this brief reply to the argument for defendants in error, call attention to the propriety and importance of final decision by this court in the present proceeding on the merits of the entire controversy, and shall then briefly

emphasize the significant propositions of law involved, pointing out finally the equity and justice of the Indian claims.

I.

REPLY TO BRIEFS FOR DEFENDANTS IN ERROR.

The holding of Byrne v. Alas as to what the rights of Mission Indians were under the Mexican law has not been disturbed by the decision here under review; but if it had been, the Mexican law as to Indian rights cited by defendants in error in their brief is not in conflict with the doctrine established by Byrne v. Alas.

In order that the foundation upon which we claim the title to these Indians rests may be destroyed, a large part of the brief of defendants in error is devoted to showing that Indians such as the plaintiffs in error here had no rights of use or occupancy of lands under the Mexican system. Our position is that it is idle to search the authorities on this subject, for the reason that the status of the property rights of such Indians as these under the Mexican law in the territory embraced by California is conclusively fixed and determined by *Byrne* v. *Alas* (74 Cal., 628); and whether such status be there determined correctly or incorrectly, it is the established law, and has not been affected or modified by the opinion of the court in the case of *Harvey* v. *Barker* here under review, and so long as it stands as the State supreme court's construction of the Mexican law formerly applicable within the boundaries of California, it is binding upon this court. (See *Christy* v. *Pridgeon*, 4 Wall., 196.) But in

their supplementary brief counsel for defendants in error seek to make it appear that the supreme court of California, in its opinion here under review, has repudiated the doctrine established in *Byrne* v. *Alas* as to what were the landed rights of such Indians as these under the Mexican law. Nothing can be plainer, however, than the fact that the supreme court of California in this case did not attempt to pass upon the question as to what the rights of such Indians were *under the Mexican law* as to the lands they were occupying, and for the very obvious reason that it held that as *there were no Indians in possession*—the prefect having reported the land to be *vacant*—therefore there were no Indians' rights, regardless of what the Mexican law was in cases where Indians *were in possession* when grants were made. That the court did not attempt to define or pass upon the question as to what were the possessory rights of such Indians under the Mexican law is clear from the following language treating of the subsequent forfeiture of such rights by their failure to present them, namely:

> In this case, therefore, if any rights whatever can be conceded to the appellants under the former Mexican Government [a point not passed upon], such rights were in the nature of private property, or a right dependent upon the will and pleasure of the State or nation. If, as claimed, it were a right to possess, occupy, and use land, that amounted to a title to property. It being a title or right to property, whether in fee simple or possessory merely, derived from the Mexican Government, under the act of Congress of 1851, as repeatedly held, a claim to that

> right was required to be presented for confirmation. If, on the other hand, it were a mere license at the pleasure of the former Government to occupy the land, such right would not prevent that Government from granting the land unencumbered with such right.

It was perfectly clear to the mind of the Justice who delivered that opinion, that under his theory of the law, it was entirely immaterial what was the character of the Indians' rights under the Mexican law, as he held that if they were valid vested rights, entitling them to possession as against the Government and all others, they were therefore such rights as it was necessary to present to the board of land commissioners for confirmation, and that the failure to present them, however valid they might have been, was fatal to them. Or if they amounted to a mere license, then the act of the Mexican Government in making grant of the lands to another terminated the Indians' rights. In either event it was unnecessary to go into the question as to the original character or validity of the rights, for they had subsequently been cut off.

The court makes two references, one as to the grant to Warner not interfering with the Indians' rights, and the other as to Warner's grant not being subject to the Indians' rights, which when taken alone might be construed as intended to pass upon the character of their rights under the Mexican law. But these passages, when read in connection with the whole decision, show clearly that in the first instance the court merely meant that as it held there were no Indians in possession, and

the lands were "vacant" when granted, the grant *for that reason* did not interfere with any Indians' rights, as—according to the court's view—there were no Indians having any rights, there being no Indians in possession; hence the court, under this view, was not called on to determine what might have been the rights of Indians, had any been in possession. And all that was meant by the statement that "the grant to Warner of the Valle de San Jose was not *subject* to any rights or interests in the defendants" was that the grant did not *on its face* contain any reservation in defendants' favor, or purport to be subject to their rights; only this, and nothing more.

We therefore confidently assert that the construction of the Mexican law applicable to the landed right of Mission Indians in California, as fixed in the case of *Byrne* v. *Alas*, has been in no way affected by the decision here under review; and we submit further that the conclusions there reached are sound. We are not called upon, however, to go into this. But, taking counsel's own view of the matter, that *Byrne* v. *Alas* can not be regarded as still fixing the status of the Indians' landed rights under the Mexican law, we ask, Have the authorities they have quoted bettered the situation for them? We submit that when, from the mass of irrelevant matter quoted and referred to in the brief for the defendants in error, there are culled the material things, which have a bearing upon the interests here involved, the same conclusion reached by the court in *Byrne* v. *Alas* necessarily follows.

We call the court's attention to three extracts from the brief for defendants in error that in our opinion fully sustain our position.

At the bottom of page 10 it is shown that article 17 of the rules and regulations of the Mexican Congress, passed for the carrying into effect of the colonization laws of 1824, provides as follows: "In those territories where there are Missions, the lands occupied by them can not be colonized at present, nor until it be determined whether they are to be considered as the property of the establishments of the neophytes, catechumens, and Mexican colonists."

On page 11 of the brief of defendants in error it is shown that later, in 1834, when the secularization of the Missions was provided for by Governor Figueroa's provisional rules, it was provided that lots at the missions were to be divided to the Indians to cultivate, and it is said, "By subdivision 9 it was directed that *where the Indians were left in rancherias at a distance*—from the missions—[as was the case here] they should be formed into a pueblo and *a like distribution made.*"

On page 13 of the brief of defendants in error it is stated that article 20 of Governor Pico's regulations of 1845 declares: "*It being understood that they* [*the Indians*] *can not alienate said lands, but they shall be hereditary among their relatives according to the order established by the laws.*"

Here our adversaries quote the law that establishes for these Indians just such rights as we are contending for them, namely, an ownership of the beneficial title,

with no power of alienation, the use being confined to the Indians and their descendants. It is true that the law quoted contemplated the formal establishment of pueblos including these Indian villages or rancherias, and a segregation of the holdings of the individual Indians from each other; that is, that their separate tracts should be allotted to them in severalty, and this is not shown to have been done in this or any other instance that has been brought to our attention. But this partition or segvegation as between the Indians was but an insignificant incident to their title, and the failure to administer this feature of the law by the Mexican officials charged with making the allotments does not affect the *rights* of the Indians, or the policy of the law that dictated that the rancherias should be secured to them by an inalienable title.

When all of the chaff in which it is hidden is blown away we have these three propositions conceded in the brief of our adversaries: *First, that the regulations of the Mexican Congress reserved from colonization the lands occupied by the missions until it was determined whose property they were; second, that upon the secularization of the missions later, it was determined that where Indians of the missions were left on the rancherias the lands were to be distributed to them for their use and cultivation; and, third, that they should have the right to use and occupy these and that this right would pass by heredity, but that no power to dispose of them otherwise existed.*

It would be difficult by any process of reasoning, or by any other citation of authority, to justify more

clearly the conclusion reached by the court in *Byrne* v. *Alas*, as to the rights of Mission Indians under the Mexican law than is shown by these three extracts from the briefs of our adversaries. So we submit, that so far as they are concerned, it is utterly immaterial whether we consider the rights of these Indians under the Mexican law as being fixed and determined by *Byrne* v. *Alas*, or whether it depends upon the Mexican law, as clearly shown by the above citations from the brief of the defendants in error. In either case it shows a valid possessory right in the Indians.

The defendants in error seek to escape the conclusion to which these authorities necessarily lead by saying, on page 11 of their brief: "It will be observed that there is no provision made, either for the distribution of lands similar in character to the lands in suit, or for the reservation of any rights of occupancy on the part of the Indians who might be living thereon, unless organized into pueblos." This is begging the question, for the reason that the lands in controversy here are admittedly the same character of lands referred to as "rancherias," as these Indian villages are all known in the Spanish language as *rancherias;* and the fact that the Indians had not been formally organized into pueblos in no way affects the principle or policy of the law which secured to these Indians their rights of use and occupancy of these lands, prior to, and regardless of, the organization of the pueblo, and prior to and regardless of the partition and allotment of the lands. These were but administrative acts—part of the machinery outlined

in making effective the general policy which awarded to these Indians the right to use and occupy the lands, but not to dispose of them. The mere fact that these lands had not been segregated between the Indian claimants, as was contemplated under the Mexican law, can not be taken advantage of by the defendants in error here, as the mere failure to administer this phase of the law would not inure to the benefit of the Mexican grantee. He can not complain that the Indians hold their lands in common rather than in severalty; he is not injured by such a course.

CERTAIN ERRORS AS TO FACTS IN THE BRIEF OF DEFENDANTS IN ERROR.

Counsel's statement at the bottom of page 15 and top of page 16 of their brief, that the *Agua Caliente* was not recognized as a Mission Rancho, is contrary to the fact, and in the face of the evidence of all parties in this case; and the support given to such view by the citation from Bancroft is, under the circumstances, entitled to no weight.

We do not know just what Mr. Bancroft's statement means. The citation can not be verified. A "mission rancho" may have meant a holding in the cultivation of the mission itself by the members of the religious order and its immediate servants, and possessing buildings and other improvements which they erected. In such sense Agua Caliente was not a mission rancho; but it is beyond question that it was under the jurisdiction of the San Luis Rey Mission and had intimate relations therewith. This record shows that the fathers

visited Agua Caliente and held religious services in a building which typified the joint purpose of the mission work—the building was a granary and a church; it bore the cross (Rec., 209, p. 41). The crops were planted under the supervision of the mission and the harvests carried to the mission (id., pp. 44, 48). Nuns of the church, presumably attached to the mission or responsible to it, resided at Agua Caliente until 1846 (id., p. 42). There can be no more doubt of the mission relation than of the immemorial occupancy and cultivation of these lands by the Indians and of the long existence of these settlements as Indian villages.

The statement contained on page 17 of our adversaries' brief to the effect that "when a grant was made without special reservations in favor of the Indians it must be presumed that there were no valid Indian claims," if not contradicted by the evidence, might be of some force, but all the evidence in this case, as well as the evidence before the board of land commissioners upon Warner's petition for confirmation of his grant, shows distinctly that these Indians were in possession of these lands, and never abandoned the same, from a time long prior to 1840, when the grant to Pico was made.

The statement at the bottom of page 17 of the brief of defendants in error, to the effect that the Warner Ranch Indians were outside barbarians, incapable of ownership, and incapacitated for civilization, is contrary to the evidence in this case, which shows that these Indians were under the administration and government

of the San Luis Rey Mission until after its secularization, and after that and until the change of sovereignty still remained subject to the government of the "administrators" of the mission. (See testimony of Pico and Warner, rec. No. 209, pp. 44–48.)

The statement contained on page 18 of the brief in question, that the assent of the San Luis Rey Mission was obtained to Warner's grant, finds no support in the *expediente* of such grant. On the same page it is said, in referring to the inability of these Indians to withstand the disrupting force of an aggressive American civilization, "That this should be the case in such a short time (less than a century) shows that the Indians of southern California had no cohesion, no real tribal or governmental organization. Note how *persistent* have been the Indian pueblos wherever they have existed." We submit that it is not becoming for counsel here, engaged in their work of extermination of these Indians, to dwell upon the weakness of these people and their lack of persistency in sustaining their rights or adhering to their customs, as a justification for their eviction from these premises, which they and their ancestors have held for a time beyond the memory of man.

Counsel rely upon the fact that the Mission lands were, after the secularization of the Missions, subject to grant under the Mexican law, as showing that such law did not contemplate a further protection of the Indians' possessory rights. But this by no means follows, for the reason that the Mission authorities merely held their dominion and control over the Mission properties as a trust for the benefit of the neophytes, and

when the relation of trust was terminated, so far as the property interests were concerned, by the secularization of the Missions, it was but natural that no further rights of the Mission authorities should be thereafter considered in the Mission properties. But it can not be argued from this that those who were formerly beneficiaries of the Mission control and dominion over these properties, thereby lost their rights.

The *ipse dixit* of counsel to the effect that there was no cultivation of lands by the Indians in California prior to 1833, save at the Missions, is not only contrary to the history of such Missions, but is positively refuted by the testimony in this case. (And see Government reports in appendix to this brief.)

THE TREATY OF GUADALUPE HIDALGO DID PROTECT THE INDIANS' RIGHTS.

The argument of our adversaries directed to show that "no rights of any kind were reserved to the Indians under the treaty of Guadalupe Hidalgo" proves the very contrary, for it establishes that the civilized Indians were Mexican citizens and also that the "*property*" of all the "*inhabitants*" (whether citizens or not) of the ceded territory was protected by the treaty of Guadalupe Hidalgo.

That the word "property" includes usufructs, servitudes, and easements, as well as the complete title, there can be no question, and that the word "inhabitants" includes Indians is equally certain. On pages 37 and 38 of the brief of defendants in error, the impression is sought to be conveyed that only the rights of Mexicans,

as contradistinguished from those of Indians, were protected by the treaty; and on page 44 of such brief it is said: "It was only grants, and grants which had been perfected, that were protected by the treaty of Guadalupe Hidalgo." In direct refutation of these positions we call attention to the language of Justice Field in *Knight* v. *Land Association* (142 U. S., 161), where it is said (pp. 183–184):

> It is equally well settled that when the United States acquired California from Mexico by the treaty of Guadalupe Hidalgo, they were bound under the eighth article of that treaty to protect *all rights of property* [not merely property "owned by Mexicans"], in that territory, emanating from the Mexican Government previous to the treaty.

And, again, later the court says (pp. 200–201):

> The *inhabitants* were entitled by the law of nations to protection from the new Government in *all rights of property* then possessed by them. Jurisdiction and sovereignty passed from one nation to the other by the cession, but not private rights of property—their ownership remained as under the former Government. And by the term *property*, as applied to land, *all titles* are included, legal or equitable, perfect or imperfect. "It comprehends," as said by this court in *Soulard* v. *United States* (4 Pet., 511, 512), "*every species of title*, inchoate or complete. It is supposed to embrace those rights which are executory as well as those which are executed." In this respect the relation of the

> inhabitants [not merely Mexicans] to their Government is not changed. The new Government takes the place of that which has passed away.

WHO ARE "THIRD PERSONS?"

The gist of the argument of our adversaries on the subject as to who are third persons not affected by proceedings had under the act of March 3, 1851, is comprehended in the significant query in their brief at the top of page 55, which reads as follows: "Does not such nonpresentation remove him from the class referred to in the act of 1851 as 'third persons?'" This merely means that there can be no third persons under such act except those who have presented their claims for confirmation. This is made plain by the following quotation from page 78 of counsel's brief, namely: "But, as we have seen, there can not be any paramount title from the Mexican Government except such title as is evidenced by the decree of the board of land commissioners and subsequent proceedings under the act of March 3, 1851." And again, on page 80, it is said: "There can not be any 'superior title' that has not passed the sanction of the board." And the same position is again stated on page 68 of counsel's brief, as follows: "Their rights should pass through the sieve of the land commission before they can be made the subject of adjudication by the ordinary courts of justice."

We submit that no authority can be found anywhere sustaining this position except in the decision of the supreme court of California here under review; but that

all of the decisions which have treated of the subject show that third persons are such persons as were not required to present their claims under the act of 1851, but whose rights were protected by someone else presenting a claim for the same land and having it confirmed and patented.

In the case of *Ainsa* v. *New Mexico and Arizona R. R. Co.* (175 U. S., 76–83) the court says, in referring to the act of 1851 and the decisions of the land commissioners and the district court thereunder: "Any final decision should be conclusive between the claimant and the United States only, and should not affect third parties *unless they should intervene in the district court*, for which provision was made." It is thus apparent that it was not *compulsory* upon such third persons to intervene and present their claims, but that *if they did so*, they would be bound by the proceedings had upon their title.

One may be a "third person" not affected by proceedings had under the act of March 3, 1851, although he claims under title entirely independent of that which was presented and confirmed under such act, and although his rights are irreconcilably hostile to and utterly destructive of the title that was presented to and confirmed by the board of land commissioners.

We submit that no decision of this court can be found which holds that there must necessarily be some relation of trust or privity existing between the claim which was presented, confirmed, and patented and that of third persons not bound by proceedings had under

such act. The only requirement has been that the third person's claim should be prior and paramount to that confirmed. This view is emphasized in the case of *Interstate Land Co.* v. *Maxwell Land Grant Co.* (139 U. S., 569), where the act of Congress confirming title to certain land grants in New Mexico was under consideration. That act, in confirming the New Mexico grants, used the words "be and is hereby confirmed;" and section 4 of the act provided "that the foregoing confirmations shall only be construed as quitclaims or relinquishments on the part of the United States, and shall not affect the adverse rights of any other person or persons whatsoever." (See 12 Stat., 71.)

We showed in our main brief, by numerous decisions, that such was practically the construction of this court as placed upon proceedings had and patents issued under the act of March 3, 1851. When this fact is borne in mind, the significance of the following extract from *Interstate Land Co.* v. *Maxwell Land Grant Co.* (*supra*) is very important as showing that there need be no privity between the estate confirmed and that which is asserted as an adverse interest, namely:

> The action of Congress in confirming it, and the subsequent proceedings in the Land Department, together with the proceedings in the courts to set aside the patent, have certainly settled those questions forever. *True, those proceedings do not estop a party claiming the same land under a prior grant from the Mexican Government.* But to succeed in his claim he must recover on the

> strength of his own title. In other words, he must establish the validity of his own grant in order to defeat a subsequent grant which has been adjudged valid in proper legal proceedings. The confirmation and patent of the grant in Beaubien and Miranda operated to divest the United States of all their rights to the land embraced in the grant which this country acquired from Mexico by the treaty of Guadalupe Hidalgo. *And the only way that the grant can be defeated now is to show that the lands embraced in it had been previously granted by the Mexican Government to some other person.*

We recognize that the italicized language in the above quotation is in conflict with the doctrine of *Houston* v. *San Francisco* (47 Fed. Rep., 339), analyzed by us in our main brief. But, as we pointed out in that brief, this question was not raised by the motion in that case, was not within the issues before the court, and was not necessary to the decision, and therefore such decision can not be considered as conclusive authority on that subject. We do not consider the point important, however, as in our view in the cases at bar a privity of estate did exist between the Indians holding the beneficial title and the Mexican grantee holding the legal title; but if it should be held that the Indians were strangers to the title, then we submit that this does not prevent them being third persons not bound by the proceedings had under the act of March 3, 1851, provided their title was "prior and paramount" to that presented and confirmed, although entirely independent of and absolutely hostile to such confirmed title.

Such a construction of the act is in entire harmony with its scope and purpose, which was primarily to segregate private property from public domain, and when this was done, the purpose of the act was accomplished and existing rights as between parties were not affected, whether they were based upon the same or independent titles; and any *apparent* concessions made by us to the contrary in our main brief we wish distinctly to disavow here, as no real concessions were made.

SERVIDUMBRES.

We are very much indebted to counsel for defendants in error for furnishing us in the appendix to their brief the extracts from the old Spanish *partidas* which so fully corroborate and sustain Escriche's definition of the Spanish word *servidumbres*, upon which we rely. We call the court's attention to the first paragraph of Law 1, page 118 of counsel's brief, in which the following is said:

> *The sages have properly said that a service* [*servidumbres*] *is the right and use which one man has in the holdings and estates of another, to use them for the benefit of his own.* * * * There are likewise other services which a man has in the things of another for his personal advantage, not for the particular advantage of the estate, *as where he has the usufruct of gathering the products of another's estate, or the use of the house in which he dwells or the houses of another.*

In law 14 of the *partidas* (p. 120 of counsel's brief) it is shown that a servitude may be imposed by the

voluntary act of the proprietor in consideration of affection or for value, or may be acquired by prescription. This is all we ask. If an individual out of consideration for the needs of another can impose upon his estate a servitude in favor of another, it certainly will not be questioned that a State, in its bounty and in its consideration for the interests of a helpless and defenseless people, can do likewise.

Power to grant the entire title is conceded to have been in the Mexican nation. This certainly included power to impose a servitude, as the greater power includes the lesser, and this power may be exercised either by specific grant or by the operation of general laws.

THE HARSH ATTITUDE OF DEFENDANTS IN ERROR TO THESE INDIANS.

The spirit and purpose of this case, even when the best and most commendable phase is put upon the controversy, can not address itself to the sense of justice or to the kindly sympathy or consideration of a court; and those charged with presenting the matter might well have refrained from unnecessarily flaunting before this court, with apparent indifference, their utter disregard for human rights. They might, with apologetic mien, have pleaded extenuating circumstances (if they could have found them) in justification of this suit, the outcome of a relentless spirit of greed that has crushed out every better and humane impulse of the owner. They might at least have expressed some sympathy for the helpless victims of their course, but

instead they justify themselves by calling the defendants "wandering and worthless beings," and by upholding the theory of one of the witnesses that the only good Indians are dead Indians. They also seek to create the impression that these Indians were savages and were bloodthirsty marauders by referring to the outbreak against Warner in 1851. The testimony clearly shows, however, that this outbreak was incited by a white man by the name of Marshall, whom it is conceded was Warner's former foreman. It also appears from the evidence that this outbreak of the Indians resulted from Warner's assertion of title to a vineyard claimed by the Indians (Tr., p. 34).

THE HARDSHIPS AND SUFFERING THAT WOULD RESULT FROM AFFIRMING THE DECISION OF THE CALIFORNIA COURT.

We wish to call the court's attention to the great hardship that the plaintiffs in error would sustain if the decision of the California supreme court were affirmed. Probably no decision ever rendered by that court has caused as much human suffering as would follow the enforcement of the decision rendered by a bare majority of that court in this case, as it would make homeless and without means of support several hundred helpless human beings, whose training, experience, traditions, patriarchal mode of life, and simplicity of mind utterly unfit them for the sterner and more crushing conflict of our aggressive civilization. The gravity and utter helplessness of the situation of these people can hardly be overestimated.

They are mere children without a father, wards without a guardian, homeless upon the ground where they and their ancestors first saw the light of day, and where they have lived in peaceful pursuits from a time beyond the memory of man We are here invoking the favorable action of this court, not to aid in the establishment of some new doctrine of law, or of some novel and dangerous precedent, but merely to uphold and stand by the law of the State as fixed, determined, and adjudged by the unanimous decision of its highest judicial tribunal sitting in banc, after careful and thorough consideration, and which has remained undisturbed as a rule of property in California for nearly twelve years. Even when unsupported by considerations of humanity, the doctrine of *stare decisis* stands as one of the pillars of our judicial structure. The public welfare and the certainty of the law demand it, and it is well settled that this wholesome doctrine should never be disregarded "unless it is necessary to prevent continued injustice or in vindication of clear and obvious principles of law." (Wells on *Stare Decisis*, sec. 598.) How much more sacred and binding, therefore, should this doctrine be considered when invoked in support of obvious justice and humanity.

II.

The propriety of final decision on the merits by this court in the present proceeding.

The court may fitly decide as to the sufficiency of the record evidence as well as on its relevancy. As

the court perceives, the State courts passed only upon the admissibility of the Indian evidence and, excluding the same, gave no consideration to its sufficiency as to the merits. Nevertheless, all the essential evidence on both sides of the controversy is in this record and before the court. If the case went down for new trial or further proceedings in conformity with the opinion here, no new testimony would be adduced. The case was made up below in chief, in defense, and in rebuttal, as if the merits were to be heard, and the record shows this, although the evidence was subsequently excluded from consideration (both records, *passim;* Barker record, p. 61, fol. 105; Quevas rec., p. 30, fol. 51). Why, then, we respectfully ask, should the case be sent back for a new trial (a jury was waived; rec. 209, p. 13; rec. 210, p. 14) and review by the same State courts which determined the controversy in its present stage? It is not likely that any decision by those courts will be accepted as final; and as the right to come here after determination on the merits below appears to be clear, the case would doubtless come back here for review on the merits after decision thereon below.

We therefore respectfully and earnestly submit that the court should take this entire controversy now for final decision on the essential question involved. All the parties are here, all the evidence is before the court; we do not understand that the defendants in error object to this prayer. It is particularly fitting that the Supreme Court of the United States should settle conclusively, whenever it is possible, such In-

dian rights as are here in question, as being an issue of national concern and importance. This course will avoid delay; prompt settlement of litigation is a principle and policy which may always be invoked with propriety. The court has under similar circumstances adopted this course when a *venire de novo* or remand was the ordinary and usual proceeding. (*Stanley* v. *Schwalby*, 162 U. S., 255, and cas. cit.) We presume the court may take this course whenever they deem it advisable; and while, perhaps, in the review of a case coming from State courts, the course suggested might not ordinarily be considered judicious. we respectfully suggest that under the present circumstances no real ground of objection exists.

The national source of the plaintiffs' title, as well as the Indian relations, make the case appropriate to be decided here on the present record. And the force and bearing of this suggestion is, we think, illustrated by the following quotations from the language of the courts below:

> By the issuing of said patent and the confirmation of the grant therein mentioned, the *Government of the United States purported and intended to convey* said lands and premises *absolutely without regard* to the rights or claims of any of said defendants. (Finding XIV of trial judge, Rec. No. 209, p. 18.)
>
> 1. That the decision of the land commissioners and other appropriate officers of the *Government of the United States*, holding to the effect that the land in question was at the time

it was granted *vacant and subject to absolute alienation, is conclusive on the defendants and all others.* (Opinion of appellate court, id., p. 80.)

Upon the words italicised we remark, as we have done in our main brief, that none of the proceedings or decisions or the patent assert or create any such title. On the contrary, the patent was issued with the stipulation that "* * * neither the confirmation of this said claim nor this patent shall affect the interests of third persons" (p. 23, Rec. No. 209). Such judicial conclusions on these records invoke the prompt exercise of this court's full and radical power of correction.

III.

The Agua Caliente grant includes all holdings under the Warner patent (No. 209) used by the Indians. Unquestionably its conditions attach to the plaintiffs' title. Equally, the Indian right attaches under the Portillo patent (No. 210).

The plaintiffs' total acreage in the "tract of land known as the *Valle de San Jose* and *Agua Caliente*" amounts to 6 square leagues (see patent in No. 209, Rec., p. 21), say, in round numbers, 27,000 acres. (P. 21 of the Jackson and Kinney Report cited in appendix.) The Indian claims are for the ancient possession and use of three parcels of 1,907, 266, and 120 acres, respectively (court's findings VII, IX, XI, Rec. No. 209, pp. 15–17), amounting in all to 2,293 acres. The valley was divided into northern and southern portions, corresponding respectively to the *Agua Caliente* grant to

Pico and the *Valle de San Jose* grant to Warner. (See stipulation or admission in record, No. 209, p. 22, fol. 37, and opinion of board of land commissioners, p. 54, fol. 94.)

There can be no question that the old settlement of Agua Caliente (the main Indian village) and the other two Indian "rancherias" are on the *Agua Caliente* or Pico grant. There is no Indian settlement in the *Valle de San Jose* or Warner grant. This record, historical records, and public reports (see Appendix) abundantly show this.

The Pico grant expressly reserved the Indian rights. Warner's petition specifically relies upon the Pico grant. The patent therefore, in effect, incorporates that grant in his tract and title. The patent on its face stipulates for protection to such interests as those of the Indians. The *expediente* of the Pico grant expressly and repeatedly reserves the Indian claim, the grantee himself fully recognizing it. Considering all the circumstances, considering the function of the land commissioners under the act of 1851, which was to determine merely the land claimants' right as against the public or governmental interest—which was not intended to create or define the petitioners' estate—surely expressions used in the land commissioners' opinion (Rec. No. 209, pp. 54, 55) can not vary the true facts in this case or weaken the principles to be applied. After all, the commissioners merely say that the description of the two parcels of land and *expedientes* shows that the Warner grant embraces the premises described

in the previous grant to Pico; that while the evidence before them fails to show that Pico completed the conditions of his grant and permanently occupied the premises, nevertheless, if there were any interest remaining in him the claimant has succeeded thereto by conveyance. These suggestions are not very positive, nor do they reach very deep into the merits of the case. Pico's rights were not before the commissioners, nor were the Indian claims. The commissioners' remarks, therefore, on the Warner grant as controlling, were unnecessary and gratuitous and should not operate to rule the present controversy. Warner claimed the *Agua Caliente* tract on the Pico grant and only the *remainder* of the valley on the *San Jose* grant to himself; it never appeared that he had performed the conditions of his own grant, which conditions were particularly repeated in nearly every document of his *expediente*. He only thinks he "made the arrangement called for in the expediente in reference to the property." (Rec., 209, p. 47.) Surely he and his successors in title are estopped from impugning the Pico grant. And beyond question this bare statement in outline of the legal foundation of the Indians' rights in reference to their moderate claims on the vast tract of land covered by the Warner patent, shows that their position is impregnable and can not be overthrown consistently with the real facts of the case or the true interpretation of the law.

As to Warner's own grant, the Valle de San Jose, for the *remainder*, even if held to embrace the entire valley

so as to overwhelm or displace the Pico grant, the reservation of the Indian rights therein is by express though general language, namely, by the word *servidumbres*, standing for just such an easement, usufruct, or "usage" as is shown in this case. Without such reservation the law protects them—the Spanish or Mexican law which our courts will apply to this situation—by the uniform recognition or imposition of the Indian occupancy as a condition of all such grants.

As to the other patent, that of Portilla or Portillo, whose claim under the Mexican grant was rejected by the land commissioners, but allowed on appeal to the United States district court and to this court (Rec., 210, pp. 21, 24, 25), the same general reservation of Indian rights by the word "*servidumbres*," translated as "servitudes," is shown by the *expediente* of that grant (id., p. 22). This tract adjoins the tract of the Warner patent, bore the same name as that of Warner's "remainder," although the latter strictly is called *Rancho San Jose del Valle* and the former *Rancho Valle de San Jose* (e. g., p. 20, Rec., 209; p. 18, Rec., 210; Report Special Agents Jackson and Kinney, p. 20, see Appendix), and is now generally known as part of the plaintiffs' "Warner ranch property." The tract in No. 210 contains 17,624 acres (Rec., p. 21) and the three Indian tracts therein involved are villages known by the special names of Mattaguay, La Puerta, or Puerta Nori, and San Jose (id., pp. 23, 24), and contain respectively 118, 70, and 37 acres (findings of court in No. 210, VII, IX, XI; Rec., pp. 16, 17, 18; see also Reports in Appendix).

IV.

Brief recapitulation of the law of the case.

This case is exactly ruled by *Byrne* v. *Alas* (74 Cal., 628); and *Botiller* v. *Dominguez* (130 U. S., 238), is not in the least inconsistent therewith on any proposition involved here. The supreme court of California thought otherwise by a bare majority, and we respectfully commend the dissenting opinions of Chief Justice Beatty and Justice McFarland (in which Justice Temple concurred) to the attention of the court (rec. 209, pp. 81–82). As this case and *Byrne* v. *Alas* are in all substantial respects identical, it may justly be urged that the Indian rights herein have been confirmed and assured (if not in strictness established and vested) by the decision in *Byrne* v. *Alas*, in accordance with the well-established principle that where a right is dependent upon and has become established or vested by a final and conclusive judicial decision, if the authority of such decision is afterwards weakened or overthrown, this result will not be permitted to disturb the right so recognized. This principle may properly be invoked here as part of the general principle of *stare decisis*. Beside such authorities on this doctrine as A. & E. Enc of Law, vol. 23, ed. 1893, p. 31, citing the case of *Seale* v. *Mitchell* (5 Cal., 403), and Wells on Res Adjudicata and Stare Decisis (pp. 542, 545, and auth. cit.) *Grignon* v. *Astor* (2 H., 319, 343), we may call the court's attention to its decision handed down on the 18th instant (Board of Commis-

sioners of *Wilkes County* v. *Coler*, No. 167), which, although applied to quite different facts, seems to declare that when the rights of parties have been determined by the law of the State as it exists at a certain time, a change in that law as enacted by the legislature or construed by the courts will not be permitted to affect such rights. (See also *Reed* v. *Ownby*, 44 Mo., 204; *Pioche* v. *Paul*, 22 Cal., 105; *Hihn* v. *Courtis*, 31 Cal., 398.)

Byrne v. *Alas* decided that Mission Indians whose use, occupation, and possession by themselves and their ancestors of lands included within a Mexican grant from a time prior to the establishment of the Mexican Government has been continuous, are entitled to remain in such occupancy against a patentee from the United States and his grantees, although they never presented their claim to the board of land commissioners under the act of March 3, 1851. The opinion in this case considers the general status of such Indian rights under the policy and law of the nations who discovered and settled this country and under the Spanish and Mexican law relating to pueblos and ranchos, and also quotes from an early report to the Secretary of the Interior upon the Mission Indians.

Botiller v. *Dominguez* decided that a complete and perfect title from the Mexican Government, as well as an imperfect and inchoate title, must be submitted to the commissioners under the act of 1851; "that no title to land in California dependent upon Spanish or Mexican grants can be of any validity which has not been

submitted to and confirmed by the board provided for that purpose by the act of 1851," or by the district court or Supreme Court of the United States The chief effect of that decision was to hold that perfect titles as well as imperfect titles must be so submitted and confirmed; from which it resulted that the grantee in that case should have presented his claim even if his grant were perfect. But it must be noted that the grantee claimed the fee-simple title, that no claim whatever under that title had been presented to the board; no patent had ever issued from the United States to *anyone* for the land, and that the defendants who occupied the land had improved and cultivated it and were in possession of it as preemption or homestead settlers under the claim that the tracts were public lands of the United States. It can not be doubted that the chief purpose of the act of 1851 was to determine this very question, namely, whether or not the lands were a part of the public domain. Nor can it be doubted that the claimant or claimants under the unpatented grant (the rights appertaining to which had been neglected by the original grantees or their successors), and not the homestead settlers, were the real intruders.

The decision itself, after reviewing the act of 1851 and pointing out that the act attempts no distinction between claims which are perfect and those which are imperfect in their character, notes that the main purpose of the statute was to separate the public domain from private property: "when this was done, the aim of the

statute was attained." It is evident that the court may not be held to imply absolutely without limitation the conclusion that each and every right or title derived from the Spanish or Mexican Government, whether legal or equitable, should have been presented to the board of land commissioners under the act of 1851, so as to include the rights of "third persons," because the language of the decision in reference to the fifteenth section of that act is that patents issued thereunder "shall not include the rights of anybody else [than the United States and the claimants] if in a position to contest the action of the board." Necessarily, the court had in mind in what was thus said the concluding clause of section 15, namely, "shall not affect the interests of third persons." The only question remaining, then, is whether or not parties in the situation of these Indians are such "third persons" protected by the very language of the act of 1851.

Since there can be no doubt that these Indians under their immemorial tribal or family possession held a prior and paramount claim of occupancy and use, which was not inconsistent with the legal title in fee, which under Spanish and Mexican usage and law, as well as under the law of this country as laid down in the decisions of this court, was a universal and necessary condition of title to lands wherever Indian occupancy existed, the Indians here come within the most strict definition of the cases as to those who are to be considered "third persons" in respect to section 15 of the act of 1851. (*Houston* v.

San Francisco, 47 Fed. Rep., 337, 340.) Thus these Indians having an equitable claim or right, rather than a title of any sort, may take the benefit of the act performed by the plaintiffs' predecessors, whose legal title was confirmed and patented, but necessarily subject, as we contend, to the Indian right. Irrespective of section 16 of the act of 1851, the Indians are third persons, whose prior and paramount claims were not required to be presented to the board; and when that section is considered the conclusion is irresistible that Mission Indians are of all others the "third persons" first and chiefly in the mind of Congress.

While the case of *Botiller* v. *Dominguez* overruled *Byrne* v. *Alas* so far as to hold that perfect grants as well as imperfect grants must have been presented to the board of land commissioners for confirmation, neither that case nor any other case holds that it was necessary to present for confirmation the claims of third persons. The distinctions to be drawn with respect to Federal and State authorities which we have cited in our main brief have there been sufficiently discussed, and are so admirably indicated in the *Botiller* v. *Dominguez* opinion that we need dwell no further upon the law determined by that case. It is, however, worth while to point out to the court that Mr. Justice Miller therein indicated (pp. 251, 252) the similar situation existing in Florida and Louisiana under the cessions by Spain and France, and the differences between the tribunals which investigated and passed upon claims in those instances, generally, and

under the act of 1851 in California; by which it appeared that the earlier laws merely directed the commissioners to examine claims and report to Congress, which reserved the right to reject or confirm such reports, while the act of 1851 established a tribunal, judicial in its character, whose decisions should be final without further action by Congress.

There was just one respect in which Congress left the situation under the act of 1851 exactly as it was under the earlier laws of the same nature, and that was in reference to the Indian claims; for section 16 of the latter act provides that the commissioners are to ascertain and report the tenure by which the Mission lands are held and those held by civilized Indians and Indians engaged in agriculture or labor of any kind, and those occupied or cultivated by pueblos or rancheros Indians. This provision of section 16 makes it, we contend, very clear that among the "third persons" of section 15 the Indians specified are necessarily included, and, indeed, are chiefly pointed out, because they were in the mind and intention of Congress in that very connection.

It should also be borne in mind that an essential difference in facts makes a necessary difference in the relevancy or application of legal principles. Thus, the language of the decision in *Houston* v. *San Francisco*, *supra*, strictly defining who were to be considered the third persons of the act of 1851, was uttered with relation to the claim there, shown not to be founded in *bona fides* and brought forward after the passage of

years in behalf of parties who were claiming to interfere with established municipal and individual rights in the city of San Francisco as successor to the pueblo.

And so *Beard* v. *Federy* (3 Wall., 478), as well as the case in which it is last cited and approved, *Thompson* v. *Los Angeles Farming Co.*, decided at the present term (see 180 U. S., 72), show that the court has in view the question who is the real intruder, the title claimant or the claimant of the possession. And the term "third persons" was by that case justly held to embrace not all persons other than the United States and the claimants, but only those who held superior titles, in which class the long anterior and highly meritorious rights of these Indians surely fall.

In the case of *Mitchell* v. *Furman*, recently decided (March 11, 1901), the court reviews the decision of *Botiller* v. *Dominguez* in respect to the light which it casts upon the laws applying to Spanish grants in Florida, which were similar to the act of 1851, and reaches the following conclusion:

> We are of opinion that these acts applied and were intended to apply to all claims, whether perfect or imperfect, in that particular resembling the California act; that the courts were bound to accept their provisions, and that there was no want of constitutional power in prescribing reasonable limitations operating to bar claims if the course pointed out were not pursued.

Thus by this very recent decision it is evident that the chief point, perhaps the only point, determined in

Botiller v. *Dominguez* was that perfect as well as imperfect claims must be submitted to the land commissioners under the act of 1851 respecting private land claims in California.

Nor is anything contained in other recent authorities which weakens the contentions we have made.

In *United States* v. *Santa Fe* (165 U. S., 675) it was held that an inchoate claim which could not have been asserted as an absolute right against Spain or Mexico, and was subject to the uncontrolled discretion of Congress, is not within the operation of the act of 1891 creating the existing Court of Private Land Claims. The decision points out that the act of 1891 confers a narrower authority to adjudicate land claims than the act of 1851. The earlier act authorized adjudication of any right or title and conferred the power to presume a grant in favor of a town. The later act omits the power to invoke this presumption and excludes any claim the completion of which depended upon the grace or favor of Spain, Mexico, or the United States as successors to these Governments. And it should be noted that the petition in that case claimed a tract of 4 square leagues as vested in the city merely by operation of law, upon a record which contained no proof as to the possessory claims of lot holders in the city, or as to the actual possession by the city, whose rights the opinion characterizes as "pretensions."

So in the case of *United States* v. *Sandoval* (167 U. S., 278), the *jus disponendi* remaining in the Government is established upon a record presenting the same considerations as that of the Santa Fe case just referred to, and

therefore the reasoning and conclusions of the latter case were decisive; while in the case of *Pueblo of Zia* v. *United States* (168 U. S., 198) the point determined was that a certain claim of the pueblo was shown by the documents to have been a mere right of pasture—the applicants prayed to have the tract *considered as their pasture ground.* And the statement of the court's conclusion, namely, that the instruments did not vest title in the pueblos, but were a mere license revoked by subsequent grants or by the treaty of Guadalupe Hidalgo ceding that entire territory to the United States, shows in itself that the circumstances and instruments there should not affect the very different nature and wider scope of the Indian rights here. Such rights, as we claim, always operate as a perpetual condition or trust engrafted upon the fee; and therefore under the Mexican grants and the United States patents there was not the revocation of a mere license, but the completion of a title, which, by the very fact of completion, stood for the protection of this included condition or trust.

In *United States* v. *Conway* (175 U. S., 60, 71) the last paragraph of the opinion establishes precisely the same point in reference to the present Court of Private Land Claims act as we have made regarding the act of 1851, namely:

> The main object of the Court of Private Land Claims is to ascertain and determine whether the land claimed as private property under the treaty is in fact private property, or, on the contrary, is public property. In the latter case, of course, a confirmation is refused; in

> the former case, a confirmation is made if the claimant appears to have, as between himself and the United States, the right to it, *but subject to the rights of others who are at liberty to assert their superior title in the local courts.*

Dwelling, now, somewhat on section 16 of the act of 1851—it provides:

> That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the Mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by pueblo or rancheros Indians.

It is impossible to understand or give force to this section unless it be appreciated that it was in the purpose of Congress, in harmony with the general policy of the Government, to exercise a paternal supervision and control over all the affairs of the Indians, and to reserve to the political branch of the Government an absolute jurisdiction over their persons and property rights, somewhat in the nature of a guardianship or curatorship. They are "the wards of the nation." Section 16 has its complement in subsection 2 of section 13 of the act of March 3, 1891, creating the Court of Private Land Claims, viz:

> No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place.

This provision has been construed by the Supreme

Court in the case of *United States* v. *Conway, supra*, and a number of pertinent cases are cited.

When Congress delegated to commissions and courts the power to exercise one of its functions, it was its intention so to limit the exercise of that power that whatever rights the Indians possessed were not to be affected in any way, but they were to be dealt with afterwards by the political branch; that consequently the confirmations of the commission, and patents issued by virtue thereof concerning lands in which the Indians had any interest were without influence upon the status of and were subject to their rights in the lands. These rights were susceptible of determination and disposition by Congress alone, and the manner and procedure of such disposition were reserved to it. Therefore, regardless of any proceedings before the commissions and the courts, the *status quo* of the Indian interest was to be preserved, to receive the solicitous care and action of Congress when it might be so disposed. The records of Congress and the statute books are filled with convincing evidences of the continued solicitude and concern which the political department of the Government has always had in the affairs of the Indians and all matters in which they were interested, even remotely. This history also shows that because of their political disabilities and their peculiar relation to the State, in the delegation of any of its functions Congress has always jealously and zealously safeguarded the rights and interests of the Indians. The sixteenth section of the act of 1851, like subsection 2 of section 13 of the act

of March 3, 1891 (Court of Private Land Claims act, 26 Stat., 854), evidences this continued policy of Congress and shows that the Indian rights and claims were reserved from the jurisdiction of the commissioners under the act of 1851.

We are unable to discover whether or not the commissioners performed the duty imposed upon them by section 16 of the act of 1851, and made the report to Congress which was directed. But even if they did not do so, this makes no difference. The important point is the intention of Congress on the subject, and that is clear beyond dispute.

We earnestly contend and respectfully submit that one of the two following propositions must be accepted as the undisputed law of this case: Either—

1. That the Indian occupancy attaches to the fee and is entitled to the benefit of the proceedings under the act of 1851 as a right reconcilable with and not hostile to the title in fee; or

2. By virtue of the provision respecting "third persons" in section 15 of the act of 1851, and especially by virtue of section 16 of that act, plainly withdrawing the Mission Indian rights from the *judicial* functions of the commissioners under that act, the Indian claims were not cut out by the patent, and remain *in statu quo.*

The syllabus in the case of *United States* v. *Chavez* (id., 509), is a clear statement of the broad principle for which we contend, namely:

> Upon a long uninterrupted possession of lands in Mexico, beginning long prior to the

> transfer of the territory in which they were situated to the United States, and continuing after that transfer, the law bases presumptions as sufficient for legal judgment in favor of the possessor in the absence of rebutting circumstances, which do not exist in this case.

The recent case of *Pablo Maese et al., appellants*, v. *Hermann, Commissioner, etc., et al.*, in the court of appeals of the District of Columbia (Washington Law Reporter, vol. 28, p. 694), is an illustration of the extent to which our courts in passing upon Spanish and Mexican grants regard the Spanish law or system, especially in reference to such conditions of trusts and rights of occupancy as are here shown. In that case it was a pueblo grant, and the decision holds, after reviewing the history of the particular grant (Las Vegas) that the land embraced in the grant was not intended to be assigned or transferred in absolute property to the grantees and their heirs, "but was intended to be held by them in trust for the benefit of the inhabitants who might settle thereon."

> Such rights as were conferred by this grant were of a communal nature and such as are recognized by the modern civil codes of continental Europe, and especially by the laws and customs of Spain, and which have been largely recognized in the laws and ordinances adopted for the settlement and government of her colonies on this continent. (Id., p. 700.)

The rights of these Indians of southern California, so related to the Missions there, were obviously assim-

ilated to these communal rights of pueblos, and should be judged and protected as analogous and based upon the same legal and equitable principles.

V.

Justice and equity combine with law to make the case for the Indians impregnable.

We need not discuss further the great authorities and the general rules relative to Indian rights in the soil. While *Fletcher* v. *Peck*, *Cherokee Nation* v. *Georgia*, *Worcester* v. *Georgia*, and *Johnson* v. *McIntosh* deny to the Indians complete title to this country as against discoverers and settlers, and deny to them full rights of sovereignty, all these cases determine that the Indian title is occupancy and the Indian right of occupancy is sacred. These principles were adjudged in reference to our own Eastern and Northern aborigines, the wild and savage bands whose claims do not present so strong an appeal as the more civilized and Christianized Indians of southern California.

Byrne v. *Alas* quotes from a certain Government report (p. 634) as to the difference between the standing of Mission Indians and the "wild or wandering tribes" of Indians under Spanish law.

One of the more recent statements by the court of the general position of the Indians is the following, taken from *Beecher* v. *Wetherby* (95 U. S., 517, 525), in which Mr. Justice Field delivered the opinion of the court:

> But the right which the Indians held was only that of occupancy. The fee was in the United

> States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race.

The Indian evidence in this record, and that of the Spanish and American witnesses in their behalf, bears its own internal proof of genuineness and *bona fides*, and shows beyond question as a fact accurately established the long occupancy of the Indians. (Rec., 209, pp. 33–53.) The clear and strong inference from all the facts shown here, and known historically in relation to the discovery and settlement of that country, is that the use and occupancy of these Indians and their ancestors has been immemorial. The native races were, of course, in that country long before the Spaniards—exactly how long, no one can say. The Missions established throughout California in the last quarter of the eighteenth century sought the Indians in their native homes. This was an especially fertile and attractive valley, and possessed a spring which doubtless has been famous for generations, being used for its remedial baths, and also (though a hot spring) for irrigation, as the testimony shows. We do not need such statements as those made by Mr. W. J.

Magee ("The Old Yuma Trail," National Geographic Magazine for March, 1901) as to village sites, watering places, and irrigation, to assure us that the Indians as prehistoric irrigators engaged in a ceaseless chase for water in southwestern America, and were sure to be established in their primitive village life about every available spring.

As to the suggestion of abandonment by the Indians, we think our main brief shows that it would pervert the record to draw that consequence from the references to the San Jose portion of the Warner grant as "vacant," since that word relates merely to the San Diego Mission's use and cultivation. It is manifest from the case of *United States* v. *Arredondo* (6 Pet., 691, 747, 748), that in reference to an assertion of abandonment by the Indians, Spanish law seems to have followed a legal proceeding in the nature of an inquest of office as a judicial act, followed by a sentence of the intendant in his official character on the report of the attorney and surveyor-general. And even then the Indian right of occupancy was reserved whenever it should be resumed; that is, if the abandonment was voluntary, the Crown's dominion was unimpaired in plenitude; if by force the Indians always had the right to return whenever they had the power and inclination to do so.

In reference to these foregoing points and other considerations involved in the case, we beg to call the court's attention to certain authorities and reports cited in the appendix to this brief.

These Indians are certainly not intruders on these lands. No one could undertake to say when they or their ancestors have not resided there. Where would they go if they were driven off? Such eviction (officially recognized, so to speak) would be a new thing in this country. Even if it were right to send these aboriginal Acadians from their immemorial home, no new territory has been set apart or provided for their reception. Always heretofore, and in reference to nations of Indians whose cruel and savage attacks on the whites can not be denied, the United States have regarded the Indian titles and claims, and have extinguished the same under treaties, by purchase, or by allotment of equivalent lands. This programme has always been scrupulously carried out in the past by the United States. It is notorious that the case of these Mission Indians has constituted now for over fifty years one of the strongest appeals contained in the whole story of the Indians' relation to the United States. Must these Indians be driven into the ocean, a few leagues to their west? There are no isles of the sea there to receive them. It may be that the plaintiffs herein (as has happened before in the history of the Government), if they should unhappily succeed in dispossessing the Indians, would be willing to sell to the Government for a substantial sum the small Indian parcels contained in the very large tract which originally they obtained from this Government (in effect) for nothing.

The California act of April 22, 1850 (Stat. Cal., 1850, p. 408), shows what the people of California

thought at that time regarding the Indian situation; for it provided that proprietors of lands on which Indians are residing shall permit them to continue their residence unmolested in the pursuit of their usual avocations, and may, if they wish, have a sufficient amount of land for the necessary wants of the Indians, including the site of their village or residence legally set off, without, however, making a selection to the prejudice of the Indians; and that the Indians shall not be forced to abandon their homes and villages where they have resided for a number of years. We can not discover that this act has ever been repealed; it may have become obsolete. But the act of January 12, 1891, providing a partial and tardy relief for the Mission Indians, refers in its sixth section (26 Stat., 712) to this California act of April 22, 1850, as being the basis of the Indian rights along with the original grants from the Mexican Government. And the view of Governor Downey (whose estate is prosecuting this suit) on the justice and equity of the case is shown by a letter, dated October 10, 1874, which he wrote to Special United States Commissioner Charles A. Wetmore (Report of Charles A. Wetmore, special United States commissioner of Mission Indians; Washington, 1875; p. 17; see appendix), in which the governor says:

> I am glad you have been appointed commissioner to these poor, unfortunate, deserving, and neglected Indians. * * * The Government has stood by and sanctioned the robbing of the Mission lands that were intended by the Spanish

and Mexican Governments for neophytes. They have lavished millions on less deserving human beings than these docile creatures. Now, in the name of humanity, urge something in their behalf.

All that the Indians wish is that the *status quo* shall be preserved, so that they may go on as through generations past and cultivate the fenced portions of their small tracts and pasture their cattle on their moderate holdings outside the fences with some assurance that the Government survey of their tracts (Rec. 209, pp. 50, et seq.; Rec. 210, p. 30) as situated in the midst of the plaintiffs' great holdings (which are measured by the square mile) shall be regarded as a final and assured delimitation of their rights.

Respectfully submitted.

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APPENDIX.

THE PRINCIPLE OF INTERNATIONAL LAW: JUDICIAL NOTICE OF SPANISH LAWS.

"According to that code [the law of nations] a change of government is never permitted to affect pre-existing rights of private property." (*Dent* v. *Emmeger*, 14 Wall., 308, 312.) This principle is stated in *Strother* v. *Lucas*, (12 Pet., 412), in which the court discusses generally the laws, usages, and customs of Spain in relation to the grants, transfers, and tenure of village property.

United States v. *Turner* (11 How., 663), decides that Spanish laws prevailing in United States territory before its cession, and affecting titles to lands there, must be judicially noticed by the court, and their existence is not matter of fact to be tried by jury. Otherwise, title to lands in States afterwards created out of such territory would be unstable and hence insecure.

MR. CUSHING ON INDIAN RIGHTS OF OCCUPANCY.

The view at one time current that Indians might be ousted by white settlers is thus disposed of by Mr. Cushing (7 Op., 293, 299):

> There is one other idea, * * * namely, that any white settler may rightfully take possession of any of the lands occupied by the Indians, and oust them prior to the extinguishment of their occupancy title by the United States. This idea is too absurd to admit of reasoned reply. Suffice it to say that a white settler has the same

> right thus to oust Indians as he has to oust white men, and no more; that is, the right to substitute robbery for purchase, and violence for law.

We do not mean to suggest that the holders of the title here are in the same position as such white settlers; nevertheless, Mr. Cushing's forcible language applies in a measure to any claim of civilized white men to lands occupied by Indians, whose right of occupancy was manifestly established and has never been lost or extinguished.

> All land titles in America, *at least all held by men of European race*, are deduced from the Government. (8 Op., 333.)

ABSTRACT OF CERTAIN GOVERNMENT REPORTS.

Report of Charles A. Wetmore, special United States commissioner of Mission Indians, Washington, 1875 (not published as an executive document), discusses the era of missionary establishments, and shows that the San Diego mission was founded July 16, 1769, and the San Luis Rey June 13, 1798. He says: "The missionaries were performing a semi-religious, semi-political work, aided by the authority and power of Spain. They gradually assumed control of the entire coast. The Indians were by degrees brought under subjection and gathered in towns in the vicinity of the missions, where they were instructed in a rude system of agriculture and in a few of the arts necessary to the lowest grades of civilized life (p. 2).

> The Indians have been forced by superior power to trade their patrimony, etc., until they have, as the Mission Indians in California, simply the right to beg. * * * They have begged in vain for legal rights. Their right of petition to Congress has been ignored. All this

distress might have been avoided if the Franciscan Fathers had secured grants in fee of the mission lands, to be held as designed in trust for future allotment among the neophytes in civilization, etc.

The report then shows how Southern California prospered through the industry and social order brought by the missions, and gives figures for population and property in 1826. In 1822 Mexican independence was declared. Under the sway of Mexico California became the field for Mexican schemers and land grabbers. "Private grants were repeatedly issued for all the available valleys on the California coast," etc., the result of which was that after the law of secularization of the missions was passed the mission lands were "divided up among a few influential Spanish and Mexican families, and the prosperous, self-sustaining Indians were made vagabonds and beggars without hope by act of law." The encroachments upon the Indians are shown under the rancheros first, who allowed the Indians to cultivate small patches of land and then, in the era of the squatters and farmers, until the Indians lost all their traditionary and customary rights "and are just now everywhere trespassers on the land—vagrants and troublesome neighbors to the whites. They still support themselves partially by cultivation of the soil, but they have no undisputed titles (except in one or two instances of special Mexican grants to Indians) to their homes" (p. 5).

This report also calls upon the Government to adjust and determine the rights of Indians on public lands, with due regard to the claims of white settlers who have been invited by law to seek homes in the same localities; to treat the Indians as wards of the Govern-

ment, which must be the guardian and trustee of all their rights, or establish such trusteeship for them. Mr. Wetmore's plan seems to have been to reproduce, as far as circumstances will permit, the old mission system, and to revive the slumbering influences which once controlled these Indians (p. 10). The prelate of the Roman Catholic Church who was consulted by Mr. Wetmore (p. 13) suggested that that Church could have nothing to do with them unless it had permanent control "and the Indians should have permanent homes, so that our work among them may not be lost. Let the Government buy a tract of land suitable for them, at least for those who have no homes."

On page 17 the following statement is made.

> Ex-Governor John G. Downey, under date of October 10, 1874, writes a personal letter from Los Angeles, in which he says: "I am glad you have been appointed commissioner to these poor, unfortunate, deserving, and neglected Indians. * * * The Government has stood by and sanctioned the robbing of the mission lands that were intended by the Spanish and Mexican Governments for neophytes. They have lavished millions on less deserving human beings than these docile creatures. Now, in the name of humanity urge something in their behalf."

The *report of Special Agents Helen Jackson and Abbot Kinney* to the Commissioner of Indian Affairs, Washington, 1883 (Senate Doc. No. 49, 48th Cong., 1st sess.) ["Helen Jackson" was the author and humanitarian Helen Hunt Jackson] refers to the wise and humane intention of the Mexican Government toward these Indians, and to the Spanish colonization plan under the missions. In 1830, under the control of the

Franciscan Fathers, 20,000 or 30,000 of these Indians were living comfortable and industrious lives (p. 7).

> No one can visit their settlements, such as Agua Caliente, * * * without having a sentiment of respect and profound sympathy for men who, friendless, poor, without protection from the law, have still continued to work, building, fencing, irrigating on lands from which long experience has taught them that the white man can drive them off any day he chose.
>
> (P. 8.) Third. In regard to this latter class—that is, those whose villages are now within the boundaries of confirmed grants—the Government has to choose between two courses of action: Either to remove them and make other provision for them, or to uphold and defend their right to remain where they are. In support of the latter course, we believe a strong case could be made out, and we have secured from one of the ablest firms in southern California a written legal opinion on this point. It seems clear that this contest should be made by the Government itself.

See legal opinion referred to, Exhibit A, pages 14–16, of this report; see also Exhibit D, "The Warner's Ranch Indians," pages 20–22.

The report recommends that Indian reservations already set off by Executive order, and all new reservations, whether of Government lands occupied by them, or lands which may afterwards be legally reclaimed for them from the grant lands where they are now living, be patented to the several bands now occupying them, the United States to hold the patent in trust for a certain period and then to convey by patent to the Indians individually. The report calls attention to the insecurity of reservations made merely by Executive order, as illustrated in southern California by the

history of Agua Caliente among others. Upon this point it is pertinent to call attention here to the "Report on Indians taxed, etc.," under the Eleventh Census (p. 212), referring to "Agua Caliente village," in which the statement is made that "it was formerly set apart as a reservation, but the Executive order was canceled immediately after the patent had been granted to San José del Valle ranch, the second of the two grants, although whether the boundaries of the village were included within the grant is doubtful. The first three surveys of the ranch do not take the village in."

The Jackson and Kinney report goes on to state that the insecurity of the reservations set apart by Congress is only a degree less. The communal system, on which those now living in villages use their lands satisfies them. It is precisely the same system as that on which the pueblo lands were cultivated by the early Spanish settlers in southern California. The Indians respect each other's right of occupancy, etc.

Note especially in the *Indian report under the census of 1890, p. 202*, Indians in California, 1846–1890. This refers to the Mexican Government as not recognizing the Indian right of occupancy. But we contend that the statement should be held to contemplate the general Indian situation or the situation of the fighting Indians of northern California; that is, of the Indians who were afterwards gathered on reservations. (See *infra* in the passage cited.) While the right of Indian occupancy was recognized by this country even where savage tribes were concerned, this does not seem to have been the case in Mexico (cf. *Byrne* v. *Alas*, 74 Cal., 628, 634); but Indian rights, like those of the Mission Indians, where reserved or implied in grants of mission lands, can not be considered as embraced within the

above statement, for the Mission Indians' rights were specially and peculiarly recognized and protected under Spain and Mexico (see main brief, and first portion of this brief). (Note also map of location and establishment of missions interleaved between pp. 202 and 203. Page 203, Indians in California, 1846–1890; p. 207, Mission Indians; p. 212, The Mission Indians.)

This passage speaks of the Indian war of 1851 as a *slight attempt* at insurrection. The Indians seem to have been goaded to resistance by white encroachment, or have been misled by turbulent or designing men. The record shows that the Indians who attacked Warner's ranch were the Coahuilla tribe of the mountains rather than the Agua Caliente Indians (Warner's testimony, No. 209, pp. 45–47); and it is to be observed that Ex. Doc. No. 122, Fifty-first Congress, first session, which considers exhaustively the California State Indian war claims and refers to the disturbances of 1851, makes no special mention of the outbreak on Warner's ranch. There was a a general uprising of California Indians in that year, and the one attributable to these Indians evidently could not have been very serious.

See also Id., page 214. "Condition" [in 1890].

DEFINITION OF "MISSION INDIANS."

Indian Report of the Eleventh Census, page 201: "Mission Indians is the name of those Indians in California who lived under the charge of the Franciscan fathers at or near missions from and after 1769. * * * The term includes not only those who were under the care of the mission fathers, but is the name used to this day to designate the descendants of such Indians. The United States authorities, however, use it for or

apply it to such Indians descended as above and living in the three southernmost counties of the State of California."

From the foregoing reports and other authorities it seems that the relation of the Indians to the missions was partly ecclesiastical and partly feudal; that is to say, it contained elements like the feudal retainers' status under that system—there was protection on one side and service on the other. The relation was also patriarchal and communal. In this aspect the Indians looked to the mission fathers for guidance in their temporal interests, and received instruction in the primitive arts of life, agriculture, etc., while on the ecclesiastical side they were taught and civilized and Christianized. There seems to be no doubt that the relation was altogether a beneficial and creditable one.

THE TREATY OF GUADALUPE HIDALGO.

As to the tenth article of the treaty of Guadalupe Hidalgo, which was stricken out before ratification, it provided that "all grants of land made by the Mexican Government or by the competent authorities in territories previously appertaining to Mexico and remaining for the future within the limits of the United States shall be respected as valid to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico." (Ex. Doc. No. 50, H. R., 30th Cong., 2d sess., p. 17.) The protocol of the said treaty (id., p. 77) provides in its second article as follows:

> The American Government, by suppressing the tenth article of the treaty of Guadalupe, did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression

of the article of the treaty, preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.

President Polk, in transmitting the treaty and accompanying documents to the House (id., pp. 7, 8), calls attention to the meaning of the protocol as plain; namely, that notwithstanding Article X had been expunged from the treaty, such Mexican grants were to "preserve the legal value which they may possess."

> The objection to the tenth article of the original treaty *was not that it protected legitimate titles which our laws would have equally protected without it*, but that it most unjustly attempted to resuscitate grants which had become a mere nullity. * * * The refusal to revive grants which had become extinct was not to invalidate those which were in full force and vigor.

THE CALIFORNIA ACT OF 1850.

The California act referred to in this brief is as follows (Stat. of California, 1850, p. 408):

> AN ACT for the government and protection of Indians, passed by the California State legistature, April 22, 1850.
>
> SECTION 1. Justices of the peace shall have jurisdiction in all cases of complaints by, for, or against Indians in their respective townships in this State.
>
> SEC. 2. Persons and proprietors of lands on which Indians are residing shall permit such Indians peaceably to reside on such lands unmolested in the pursuit of their usual avocations for the maintenance of themselves and their families; provided the white person or proprietor in possession of such lands may apply to a justice of the peace in the township where the Indians reside to set off to such

Indians a certain amount of land, and on such application the justice shall set off a sufficient amount of land for the necessary wants of such Indians, including the site of their village or residence, if they so prefer it, and in no case shall such selection be made to the prejudice of such Indians; nor shall they be forced to abandon their homes or villages where they have resided for a number of years; and either party feeling themselves aggrieved can appeal to the county court from the decision of the justice, and then, when divided, a record shall be made of the lands so set off in the court so dividing them; and the Indians shall be permitted to remain thereon until otherwise provided for.

THESE INDIANS ARE PEACEABLE, INDUSTRIOUS, AND HONEST.

[Extract from Annual Report of the Commissioner of Indian Affairs, for the year 1857, p. 403.]

There are at present in the counties of San Bernardino and San Diego a large number of Indians, known as "Mission Indians," who are conversant with all the operations of agriculture, and to some extent with the mechanical arts, as taught them by the native Californians, who solicit and represent that, if supplied with a few of the ordinary agricultural implements and a few oxen and mules, they would be fully able to subsist themselves, by means of agriculture, in a comfortable manner without further calls upon Government for aid. They exhibit a good degree of intelligence, and appear capable of success, if thus aided, for which they earnestly solicit.

[It seems that the dominant Indians of this section who were never brought under the Spanish governmental or religious dominion are the Coahuilas, living in the mountainous regions; the allied tribes who were Christianized and civilized are the Luisenos, represent-

ing that portion of the tribe which was originally attached to the Mission of San Luis Rey, and the Dieguenos, who were so attached to the Mission of San Diego. (Report on Indians under census of 1890, p. 201; report of Special Agents Helen Jackson and Abbot Kinney, *supra*, first page, and pp. 4, 18.)]

[Annual Report, Indian Office, 1875, pp. 9 to 11.]

THE MISSION INDIANS OF SOUTHERN CALIFORNIA.

These Indians have heretofore been the subject of much inquiry and effort for relief by the Department. In 1873 Special Commissioner Rev. John G. Ames made thorough inquiry into their condition and necessities, and made full report of the same. The measures suggested in that report and recommended by Congress for adoption not meeting with approval, Commissioner C. A. Wetmore, of California, made further inquiries as to the feasibility of a different plan for relieving their disabilities, and submitted his report in December, 1874. These reports furnished valuable information to the office, from which, together with previous reports of superintendents and agents, the following facts respecting these Indians are compiled.

They have received the name of Mission Indians from their relation to the early Catholic missions on the Pacific coast, the first of which was established at San Diego in 1769, others following until 1804, at which time there were nine missions at different points lying along the coast between San Diego and San Francisco. The missionaries, having a semireligious and semipolitical recognition by the authority of Spain and Mexico, assumed control of the entire coast, and by degrees brought the Indians under subjection and gathered them in settlements around their missions, where they

were instructed in agriculture and a low form of civilized life, and put to labor in cultivating large tracts of fertile lands, which they were allowed to occupy in common, under the direction and control of the padres The original idea on which these missions were maintained seems to have been that so soon as these Indians should be brought, as converts of the church, into a condition for self-support, the lands which they were occupying and cultivating should be allotted as their own. But the profitableness of the peonage and the docility of the Indians made any haste in the direction of individual rights unnecessary, if not undesirable, on the part of the missionaries. They were therefore continued in peonage and without recognition of their individual rights up to the date of the secularization act of 1833. At this time the Indian missions were the centers of industry and of wealth and of social attraction for the Pacific-coast country. In 1826 they were reported at twenty-one missions as numbering 25,000 and possessed of 365,000 head of cattle, sheep, and horses, and harvesting 75,000 bushels of grain. The "law of secularization," passed in the Mexican Congress, treated all these Mexican lands, with their improvements, flocks, and herds, as the property of the church, and divided them up among a few Spanish and Mexican families. The Indians were scattered over the country, principally along the coast, upon the fertile, watered, and then unoccupied tracts, and procured their living by herding wild cattle and horses, cultivating small patches of ground, and receiving employment from the surrounding whites, whom they accepted virtually as their masters.

In this way they gradually came into possession, and some have continued to occupy the best portions of

the country without inquiry as to whether their homes were embraced in the boundary lines of a Mexican grant or liable at any moment to be entered at the land office in the name of some settler.

When the tide of trade and the gold emigration swept over the State of California, these Indians were found practically without protection by law in their rights to the land on which they were living, and by suits of ejectment and cost of contingent fees it was comparatively easy for the incoming American to dispossess all the Indians of northern and middle California Thus made homeless wanderers, the process of vice and destitution by which they were carried away is fitly described as extermination. For the 4,000 or 5,000 who remained in the southern portion of Lower California, this doom seems to have been postponed by the delay in the settlement of the country. Gradually, however, for the past eight years, southern California has been filling up by immigration; Spanish and Mexican grants have been "determined" in such a way as to cover choice tracts wherever found; large ranches have been cut up and the desirable portions of public domain preempted; and thus all available agricultural lands have been seized or occupied by individual owners, who, in conformity to law, have become possessed of the lands on which the remnants of a few thousand Mission Indians are making their homes in San Diego and San Bernardino counties. So long as the preemptors and purchasers did not require their lands for use or sale, the Indians were allowed to remain undisturbed and in blissful ignorance of the fact that the place they called home had by law passed to the ownership of another. Of late, under the increasing demands for these lands,

writs of ejectment are being procured by which the Indians are forcibly dispossessed and turned adrift in poverty and wretchedness.

The Indians living on the tract of land known as Temecula, in the county of San Diego, have within the past two months been thus dispossessed. The Temecula ranch was confirmed by the district court of the United States for the Southern district of California to Louis Vigues in 1855. No steps were taken to disturb the Indians until 1873, when a judgment was recovered in the city of San Francisco against these Indians, who were at that time living 500 miles away, all unconscious that any person was seeking their possessions; and on the 17th of August last the owners, under Vigues, procured a writ from the court in San Francisco for ejectment of Indians, and for the satisfaction of the costs by the personal property of the Indians. The execution of this writ has not only deprived the Indians of their homes and of their crops just maturing for harvest, but has taken their little personal property in satisfaction of cost of judgment. It is easy to understand the exasperation and despair produced among the Indians by such an order enforced by the authority of the State. Their remonstrance and threats under the provocation were interpreted to mean violence, and the aid of the United States military was evoked against them. Their forbearance and peaceful disposition were, however, soon manifest, and the fears of white citizens allayed. The agent has been instructed to procure, if possible, a suitable ranch which may be leased temporarily, with privilege of purchase; but the embarrassments under which the Department has labored for the past two years in its efforts to rescue these Indians from their present condition still continue. There are no ade-

quate funds for their relief, either in purchasing small tracts of country, or leasing ranches, or for furnishing rations in adequate amount.

[The report of Special Commissioner Rev. John G. Ames, *supra*, will be found in H. R. Ex. Doc. No. 91, 43d Cong., 1st sess.]

[Annual Report of the Commissioner of Indian Affairs for the year 1874.]

[Pages 72 and 73.]

CALIFORNIA.

Mission Indians.—The plan earnestly recommended by the Department to Congress at its last session for ameliorating the condition of the 5,000 Mission Indians in Southern California did not meet the approval of that body, and nothing has been attempted in their behalf beyond the appointment of a commissioner, who has visited them during the past few months and is endeavoring to procure a title to certain lands, either in a body or in small patches, which these poor and inoffensive people may hold for a homestead while they make their living by herding goats and sheep and laboring for the surrounding settlers. These Indians, like those mentioned in Arizona, came to us in the acquisition of Mexican territory, and like them have been stripped of all rights, even to the lands from which they and their fathers had for hundreds of years derived a comfortable living. This class of Indians seems forcibly to illustrate the truth that no man has a place or a fair chance to exist under the Government of the United States who has not a part in it.

[From Annual Report, Indian Office, 1879, page xli.]

MISSION INDIANS.

The necessity for early legislation to provide a suitable and permanent home for the Mission Indians of

California is urgent. They are estimated to number about 3,000, and are scattered in small bands over San Diego, San Bernardino, and Los Angeles counties, earning a precarious livelihood by cultivating small patches of land and working for ranchmen and white settlers when opportunity offers. Many of them are now occupying by sufferance lands which their ancestors have cultivated from time immemorial, and to which they supposed they had an indisputable right; but those lands have lately been found to be within the limits of private land claims confirmed by the courts to grantees under the Mexican Government before the acquisition of California by the United States.

In many cases the owners or occupants of these ranches have availed themselves of the labor of the Indians in cultivating the land (often at most unjust and oppressively low rates, however), and the Indians have also been permitted to occupy and cultivate small tracts for themselves; but now, desiring to dispose of the ranches, or to use the whole for their own purposes, the owners have threatened the Indians with summary ejectment. This, together with the conflicts arising from trespass upon the lands of the ranchmen and settlers, by stock belonging to the Indians, has kept these poor people in doubt and anxiety for two years past, until at the present day they are in a state of the most abject poverty to be found anywhere on the American continent.

[From Annual Report, Indian Office, 1879, pages 13 and 14.]

[From annual report of Indian Agent S. S. Lawson.]

MISSION AGENCY, SAN BERNARDINO, CAL.,
August 28, 1879.

SIR: I have the honor to submit the following as my first annual report of the condition of things at this agency:

The Indians under my charge, known as the *Mission Indians*, are composed of the following-named tribes, viz: Seranos, Digenes, San Luis Rey, and Coahuillas and Owongos. Their settlements are scattered over portions of San Bernardino and San Diego counties, and chiefly in the mountain and desert districts embraced in a range hundreds of miles in extent. Here and there lands have been reserved for them, but their character is such that very little of it is of any practical use, and very few, comparatively, are living on the lands so reserved.

For generations past many have had their villages on what they supposed to be "the public domain," and which they believed would ultimately be set apart for them, but which in almost every instance turned out to be covered by the ubiquitous "Spanish grant," whose title has been confirmed to the inevitable "land grabber." In some instances, however, they have been accorded the favor of remaining on and cultivating these lands so long occupied by them, but not without frequent difficulties growing out of conflicting interests. The agent is continually harassed by complaints from one or both parties as to injuries or wrongs endured.

Under this unsatisfactory state of things, which has long existed, frequent efforts have been made to influence Government to provide a suitable reservation upon which to consolidate these scattered Indians. A joint resolution of the last general assembly of California was transmitted by its governor to Congress asking that this be done; and, prior to the assembling of the last Congress, letters setting forth the condition of affairs at this agency were forwarded to the Department by myself, with a view of securing at that session such action as it seemed to me the exigencies of the case demanded. But beyond the bringing the subject

before the House Committee of Indian Affairs nothing was effected. It is hoped that another session will not be permitted to pass by without final and definite action being taken looking to the purchase of suitable lands for a reservation and the consolidation of these Indians upon it before another year is past. If assurance of this kind does not come to the owners of the lands now occupied by most of them, their ejectment is certain to follow.

The Mission Indians are all engaged in agricultural pursuits, either in the cultivation of the little fields they *call* their own, or in laboring for ranchmen in the vicinity of their villages. But, on account of the sparseness of white settlers in these mountain and desert districts, and the consequent scarcity of labor, they are forced often to go from fifty to one hundred miles to procure work. At some seasons of the year it is impossible for all to find employment, while at others, such as in the sheep-shearing season, they find ample and remunerative employment, and are eagerly sought for by the large ranchmen. They excel all others in this kind of labor. With few exceptions, the Mission Indians are industrious, having always maintained themselves by their own labor. They do not now and never have asked for supplies of any kind from Government. All they ask is that land be given them upon which they may have an opportunity to better support themselves and families.

[From Annual Report, Indian Office, 1880, pages 12 and 13.]

[From annual report of Indian Agent S. S. Lawson.]

In January last the copy of an Executive order was sent me rescinding a prior order setting apart certain lands long occupied by a considerable body of Indians, known as the Agua Caliente Indians of the Coahuilla

tribe, on the ground that said lands were embraced within the boundaries of the rancho "San Jose del Valley." In conversation a few days ago with ex-Governor Downey, the present owner of the ranch, he informed me that he was about to sell it, and before he could give possession the Indians must be removed. What these people will do in this event, or where they can be placed so as to find subsistence in this sterile region of country, are questions that I am not able to answer. This is the situation of an equally large body of Indians now occupying the rancho San Jacinto, their ejectment being liable to occur at any time. This, in short, is the situation all round; and, there being no unoccupied public lands, except such as are uninhabitable, the only alternative left to these hitherto peaceable and thrifty communities is to wander about singly or by families to swell the vagabond class that already infests the villages and towns to become a prey to vices to which as yet they are comparative strangers.

As a class, the Mission Indians are industrious. During the season when labor can be had very few are found idle, and I am glad to be able to report that at present the demand for Indian laborers is more than equal to the supply, the result being plenty to eat and wear, with contentment. But, owing to their improvidence, a large proportion of them, notably those who are dependent on wages for labor, will be destitute of subsistence when the winter season comes on. Supplies of flour, meat, beans, and bacon were purchased last fall, and issued to them during the winter months when little or no labor could be found. The low rates at which I purchased these supplies made the amount expended go far toward relieving all who needed help. The same destitution will prevail again when the labor-

ing season is over, and the question of relief be forced upon the attention of the Department.

Those who by sufferance have lands to cultivate where they live have tilled them to profit during the season. Only yesterday two Indians from the San Luis Rey tribe called at the agency, reporting that they had come with two wagons, loaded with over 7,000 pounds of wheat, which they were having ground into flour for sale and for their own use. This amount the two men had raised by their own labor, and they report that their people have plenty of wheat and are doing well.

It is doubtful, however, whether they will be allowed to gather another harvest from those fields which they have long cultivated, and which, until recently, they believed to be reserved lands. Two years ago a "land-grabber" suddenly discovered that these Indians were not on the lands reserved for them in a given township east of the meridian line, but in the corresponding township west of the meridian, and at once "filed upon the land they occupied under the desert-land act." How lands cultivated by these people for more than a generation can be called "desert" I am not able to answer. But it is quite likely that certain land officials in these parts who consider the occupancy of lands by Indians as of no more significance than their occupancy by so many coyotes will have less difficulty with such questions. The Indian "must go" if he is on a patch of ground that a white man wants, and no matter that he has lived on and cultivated it for a generation. It is wanted all the more on account of its improved condition. A proper regard for justice, it seems, should prompt to some measure by which these parcels of lands might be withheld from sale and settlement until

it was seen whether it would not be in the interest of economy, as well as of justice and humanity, to give the Indian occupant permanent possession of what he has come to regard as his home.

[From Annual Report, Indian Office, 1884, pages 13 and 14.]

[From annual report of J. G. McCallum, Indian agent.]

THEIR CHARACTER.

They are peaceable and honest with but few exceptions. The young are generally ambitious and quick to learn, but not ambitious to provide for the future. They are much superior in appearance and intelligence to the other California tribes. They have little self-reliance, very subdued in manner, like people who had been accustomed to bondage or other great wrongs, and the younger portion are very timid. These Indians show no disposition to resist the policy of the Government, which they are always anxious to know, and although sometimes not acting upon what is given as advice, yet always respecting the orders of the Government.

RESERVATIONS.

These Indians have about twenty reservations, which include most of their villages, but several of these villages are within the boundaries of Mexican grants, for which patents have been issued by our Government which contain no exceptions in favor of the Indians living upon them, but all, or nearly all, such grants contained provisos in favor of such Indians.

One of the grant-holders about six months since commenced an ejectment case against about 100 Indians who reside in their village, called San Jacinto. The

special counsel employed by the Government to defend the rights of the Indians in such land cases have engaged in the defense, but the case has not been pressed on either side. In the meantime the Indian defendants remain in peaceable possession, and the plaintiff by filing his complaint has prevented the bar of the statute of limitations. Similar complaints will likely be filed against the other Indians living in villages on such grants during this year to prevent the bar of that statute.

Our learned opponents cite several passages from Mr. Hubert Howe Bancroft's "History of the Pacific States," making, however, some inadvertent errors: for instance, the citation in the second line of page 16 of their main brief to "volume 20, page 624," can not be verified. However, on our own part we respectfully call the court's attention to Mr. Bancroft's work, especially to chapter 20 of volume 18, entitled "Mexican land titles," from which the doubtful nature of many Mexican grants and the competing interests and questionable motives which were rife in California during the period of those grants, and after the acquisition of sovereignty by the United States, clearly appear, along with a statement of certain specimen cases and references to mission lands, friars, neophytes, and the church. This chapter presents an instructive history of the Mexican system of colonization and land grants, of legislation by the United States, and of the work of the land commission under the act of 1851.

In volume 19 of the same work the court's attention is directed to chapter 18, entitled "Extermination of

the Indians." The unfounded assertion of Indian revolt and atrocities is plainly shown, e. g. (pp. 476, 477):

> Their hatred for Indians was acquired on the plains, from which the milder tribes of California had to suffer. * * * Thus it is that the California Valley can not grace her annals with a single Indian war bordering on respectability. It can boast, however, a hundred or two of as brutal butcherings on the part of our honest miners and brave pioneers as any area of equal extent in our Republic. The poor natives of California had neither the strength nor the intelligence to unite in any formidable numbers. Hence, when now and then one of them plucked up courage to defend his wife and little ones or retaliate on one of the many outrages that were constantly being perpetrated upon them by white persons, a sufficient excuse was offered for the miners and settlers to band and shoot down any Indians they met, etc.

Page 479 speaks of the "slaughter" of 30 Indians suspected of murder, and the "indiscriminate massacre" of a band; and see note 11, same page; see also note 24, page 492, and especially the concluding portion of said note on page 494.

[End of Appendix.]

23442

INDEX.

PAGE

Statement of the Case 1

1. *No rights were granted to or acquired by plaintiffs in error or their successors under Mexican law* 7

The Mexican Laws applicable to California 9
The Spanish Law 21

The Michaeltorena grant to Warner, based on the Finding of the Prefect that the lands were vacant and abandoned, is an adjudication that the Indians had no rights in the premises granted 28

The Peculiarities of the Warner Ranch Indians 26

Servidumbres 32

2. *No rights of any kind were reserved to the Indians under the treaty of Guadalupe Hidalgo* 37

3. *Plaintiffs in error are not third parties whose rights are saved by the Act of March 31, 851, but the patent and the proceedings leading up to it are conclusive against them* 44

The judgment of the Land Commissioners and the District Court is conclusive that there were no persons entitled to superior rights 58

The survey is conclusive against any collateral attack 69

The action of the Government of the United States resulting in the issuance of a patent is conclusive that there were no persons entitled to superior rights ... 72

The true construction of the Act of March 3, 1851, as to third parties 78

The true construction of the sixteenth Section of the Act of 1851, requiring the commissioners to report the tenure by which Mission lands are held 89

The status of plaintiffs in error as Indians does not relieve them from the binding effect of these proceedings 91

Conclusions 97

APPENDIX.

PAGE.

Act to Ascertain and Settle the Private Land Claims in the State of California, March 3, 1851. 108

Act to Expedite the Settlement of Titles to Land in the State of California, July 1st, 1864..... 114

Colonization decree of August 18, 1824..... 123

Decree of 4th of January, 1813..... 128

Decree of 13th of September, 1813..... 129

Partida Third, Title 31..... 118

Protocol of Queretaro..... 106

Rules and regulations for colonization, Nov. 21, 1828 125

Treaty of Guadalupe Hidalgo. 101

CITATIONS.

Adams v. *Norris*, 103 U. S., 593 ..... pages 74-84-88
Ainsa v. *New Mexico & A. R. Co.*, 175 U. S., 76.....pages 66 67
Astiazaran v. *Santa Rita Land & Mining Co.*, 148 U. S., 80 page 65
Bagnell v. *Broderick*, 13 Peters, 436 .....page 86
Beard v. *Federy*, 3 Wall., 478 .....pages 52-55-61-71-74
Bernier v. *Bernier*, 147 U. S., 242.....page 87
Bixby v. *Bent*, 59 Cal., 522.....page 37
Borden v. *N. P. R. R. Co.*, 154 U. S., 277..... page 89
Botiller v. *Domingues*, 130 U. S., 238 .....
..... pages 46-48-49-50-51-52-56-57-64-67-79-84-86-89
Byrne v. *Alas*, 74 Cal., 633.....pages 17-46-58-93-94
Chavez v. *United States*, 175 U. S., 505 .....page 67
Cherokee Nation v. *State of Georgia*, 5 Pet., 1 .....page 94
Cherokee Tobacco, 11 Wall., 616 ..... page 47
Choctaw Nation v. *United States*, 119 U. S., 1..... page 48
Chouteau v. *Eckhart*, 2 How., 344 ..... page 64
Chouteau v. *Molony*, 16 How., 203.....page 94
City of Los Angeles v. *Pomeroy*, 125 Cal., 426 .....pages 80-81
Cragin v. *Powell*, 128 U. S., 691 .....page 71
De Guyer v. *Banning*, 167 U. S., 723 ..... page 56
De Haro v. *United States*, 5 Wallace, 599 .....page 37
De la Croix v. *Chamberlain*, 12 Wheat., 599 ..... pages 64-67
De La Guerra v. *Santa Barbara*, 117 Cal., 528 ..... page 80
Doolan v. *Carr*, 123 U. S., 618 .....page 89
Faxon v. *United States*, 171 U. S., 244.....page 20
Felix v. *Patrick*, 145 U. S., 317..... pages 87-94
Foley v. *Harrison*, 15 How., 433 .....page 63
Foster v. *Mora*, 98 U. S., 425 .....page 77
Foster v. *Mora*, 3 Sawyer, 460 .....page 77
Harvey v. *Barker*, 126 Cal., 262 .....pages 1-33-45-76
Harrison v. *Ulrich*, 39 Fed. Rep., 654 .....pages 75-79-83
Head Money Cases, 112 U. S., 580 .....page 47
Henshaw v. *Bissell*, 18 Wall., 225 ..... page 74
Houston v. *San Francisco*, 47 Fed. Rep., 337 .....pages 56-76-84
Interstate Land Co. v. *Maxwell Land Grant Co.*, 139 U. S.,
569 .....pages 44-54
Jaeger v. *United States*, 29 Court of Claims, 172 .....page 8

Johnson v. *McIntosh*, 8 Wheaton, 543 ..... page 42
Johnson v. *Towsles*, 13 Wall., 72 ..... page 63
Knight v. *United Land Association*, 142 U. S., 161 .....
..... pages 52-55-71-73-78-84-89
Leese v. *Clark*, 20 Cal., 387 ..... page 88
Lee v. *Johnson*, 116 U. S., 48 ..... page 63
Los Angeles F. & M. Co. v. *Thompson*, 117 Cal., 594 ... page 79
Los Angeles F. & M. Co. v. *Hoff*, 48 Fed. Rep., 340 ..... page 84
Maxwell Land Grant Cases, 121 U. S., 325 ..... pages 53-65
McDonald v. *McCoy*, 121 Cal., 55 ..... page 80
Meader v. *Norton*, 11 Wall., 442 ..... pages 85-87
Miller v. *Dale*, 92 U. S., 473 ..... page 74
Missouri, K. & T. R. R. v. *Roberts*, 152 U. S., 114 ....page 48
Montgomery v. *Bevans*, 1 Sawyer, 653 ..... page 77
More v. *Steinbach*, 127 U. S., 70 ..... pages 57-58-60-71-76-86
Moore v. *Robbins*, 96 U. S., 530 ..... page 63
Muse v. *Arlington Hotel Co.*, 68 Fed., 642 ..... page 94
Newhall v. *Sanger*, 92 U. S., 761 ..... page 62
Nieto v. *Carpenter*, 21 Cal., 455 ..... page 83
Ohm v. *San Francisco*, 92 Cal., 437 ..... page 80
Patterson v. *Wrenn*, 11 Wheat., 380 ..... page 86
Peabody v. *United States*, 175 U. S., 546 ..... page 68
Pico v. *Warner*, 73 Cal., 17 ..... page 32
Plummer v. *Brown*, 70 Cal., 546 ..... page 87
Quinby v. *Conlan*, 104 U. S., 420 ..... pages 61-63
Real De Delores del Oro v. *United States*, 175 U. S., 71 ... page 65
Russell v. *Maxwell Land Grant Co.*, 158 U. S., 253 .. pages 54-72
Serrano v. *United States*, 5 Wall., 461 ..... page 67
Shepley v. *Cowan*, 91 U. S., 330 ..... page 63
Smelting Company v. *Kemp*, 104 U. S., 636 ..... pages 63-72
Spalding v. *Chandler*, 160 U. S., 394 ..... page 48
Stark v. *Starr*, 6 Wall., 419 ..... page 87
Steel v. *Smelting Company*, 106 U. S., 447 ..... page 63
Stephens v. *Cherokee Nation*, 174 U. S., 445 ..... page 47
Stoneroad v. *Stoneroad*, 158 U. S., 240 ..... page 71
Talton v. *Mayes*, 163 U. S., 376 ..... page 93
Tameling v. *United States Freehold & E. Co.*, 93 U. S., 644 page 64
Taylor v. *Morton*, 2 Curtis, 454 ..... page 47
Teschemacher v. *Thompson*, 18 Cal., 11 ..... pages 52-88
Thomas v. *Gay*, 169 U. S., 264 ..... page 48

Thompson v. *Doaksum*, 68 Cal., 593 ..... page 83
Townsend v. *Greely*, 5 Wall., 335 ..... pages 74-84
United States v. *Alaska Packing Co.*, 79 Fed Rep., 152 ..... page 48
United States v. *Arredondo*, 6 Pet., 691 ..... pages 31-62
United States v. *California, etc., Land Co.*, 148 U. S., 43 ..... page 62
United States v. *Castillero*, 2 Black., 158 ..... page 62
United States v. *Cervantes*, 18 How., 553 ..... page 20
United States v. *Conway*, 175 U. S., 60 ..... page 65
United States v. *Elder*, 177 U. S., 119 ..... page 68
United States v. *Fossatt*, 21 How., 447 ..... pages 52-59-60
United States v. *4 Bottles Sour Mash Whiskey*, 90 Fed., 720 page 48
United States v. *Joseph*, 94 U. S., 614 ..... page 94
United States v. *Kagama*, 118 U. S., 375 ..... page 48
United States v. *Maxwell Land Grant Co.*, 121 U. S., 325 page 65
United States v. *Morillo*, 1 Wall., 706 ..... page 88
United States v. *Pico*, 5 Wall., 536 ..... page 14
United States v. *Ritchie*, 17 How., 525 ..... pages 19-20-42
United States v. *San Jacinto Tin Co.*, 125 U. S., 273 ..... page 84
United States v. *Throckmorton*, 98 U. S., 61 ..... page 83
Whitney v. *Robertson*, 124 U. S., 190 ..... page 47
Wright v. *Roseberry*, 121 U. S., 488 ..... page 63

23445

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1900.

No. 209.

ALLEJANDRO BARKER, et ali.,
Plaintiffs in Error,
vs.
J. DOWNEY HARVEY, Admr.,
et al.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Plaintiffs in error ask this Court to review a judgment for the defendants in error (original plaintiffs) in the Supreme Court of the State of California, rendered by that Court October 4th, 1899, and reported in 126 California Reports,

page 262, under the title of *Harvey* v. *Barker*. The case was heard and decided by the Court in bank, the opinion being by Mr. Justice Van Dyke, and a rehearing was denied. The action was originally brought by ex-Governor John G. Downey and the Merchants' Exchange Bank of San Francisco, and is a statutory proceeding known as an action to quiet title, brought under Section 738 of the Code of Civil Procedure of California, against the plaintiffs in error, who are alleged to claim some estate or interest in the real property which is the subject of the action, adverse to the defendants in error to determine such adverse claim. The premises are known popularly as Warner's Ranch, comprising the Valle de San Jose, a valley of nearly 50,000 acres, bounded on three sides by the Palomar, the Agua Caliente, and the Volcan mountains at the headwaters of the San Luis Rey River. The defendants in error claim title to the property by virtue of two patents. One for the northern half of the valley, issued to J. J. Warner January 16, 1880, pursuant to the provisions of the Act of Congress of March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," based upon a grant to Warner of the San Jose del Valle made by Governor Michaeltoreno November 28th, 1844. The *deseno* or sketch accompanying the petition includes the entire

San Jose Valley. The south half of the valley that defendants in error claim title to under a like patent issued to Warner on the 10th day of January, 1880, founded upon a grant made the 16th day of April, 1836, to Silvestre de la Portilla, of the Valle de San Jose, being the premises involved in the case of *Quevas* v. *Harvey*, No. 210 in this court. The two patents cover the entire valley, and the whole is commonly known as Warner's Ranch. The two cases involve the same questions and were submitted together in the Supreme Court of California, and we shall file the main brief in this case, pointing out in the Quevas case any differences.

The plaintiffs in error claim some possessory right as Mission Indians, and separate in their answer into three groups. One assert such right in a tract consisting of 1907 acres, the second in 266.43 acres, and the third in 120 acres. They base their right of possession to these tracts of land under a claim that their ancestors were Mission Indians, and that they and their ancestors have been in continued occupation of the premises from a time anterior to the grant. No evidence of any specific grant or authority from the Mexican government for such occupation is shown. The theory is that their rights arise from the alleged facts that their ancestors were Mission Indians and were in occupation of the premises at the time the grant

was made and confirmed. They claim that the patent is subject to their rights of occupation, for two further reasons—one, because at the time Warner presented the grant he also presented another grant made by Governor Alvarado to Jose Antonio Pico on the 8th day of June, 1840, of certain premises which were included within the subsequent grant to himself, which grant contained the conditions that the grantee should not molest (*prejudicar*) the Indians that thereon may be established, and that it was subject to the approbation of the Departmental Assembly. This grant, however, was rejected by the Commissioners because it had not been so approved by the Departmental Assembly, and the Commission held that the later grant to Warner included the entire premises, and ordered that the grant to him be confirmed and the Pico grant be rejected, and the patent was issued accordingly without any reservation concerning the Indians. The second ground of claim is that their rights are referred to and preserved in the words "without interference with the roads and other usages" (*servidumbres*), a clause which so far as our investigation goes was inserted in all grants.

A survey of the grant with the plat thereof and the descriptive notes authenticated by the signature of the Surveyor General were duly deposited in 1879 in the General Land Office in

accordance with the act of March 3rd, 1851, and acts supplementary thereto, which acts, so far as they are important, we give in an appendix to our brief. All objections having been disposed of, the Commissioners caused the patent, to which we have referred, to be issued, and the field notes and plat were annexed thereto. "The description and map includes the northern half of the valley of San Jose, including the premises here in controversy; the southern half of the valley having been patented to Silvestre Portillo in an earlier grant from the Mexican government in 1836." (Tr., fol. 37.) No claim is made that any reference to or indication of the existence of Indian settlements is shown by said field notes and plat. The patent shows that the Agua Caliente (Tr., fol. 34) or Hot Springs were included in the grant and plat, and the *expediente* as well as the *deseno* shows that the entire valley was described.

At the trial in the Superior Court of San Diego County the plaintiff put in evidence the patent, and it being stipulated that all the right, title, and interest of the patentee had passed to the plaintiffs, and that they had paid all taxes levied or assessed upon the premises in controversy since 1880, they rested. (Tr., fol. 38.)

Defendants then offered in evidence the complete original *expedientes* of both the Warner and the Pico grants; the proceedings before the

Land Commission, including the depositions of witnesses, and also the oral testimony and depositions of a number of witnesses, including Warner and some of the defendants in this suit, to show that the defendants (plaintiffs in error) and their ancestors had lived upon the premises in question from a time anterior to the making of the grant. The trial Court, holding that the patent was conclusive against the defendants, excluded this evidence upon the final decision of the case. The evidence is in the transcript, and we shall consider the case as if it were before the Court. From the judgment and from a motion denying a new trial an appeal was taken to the Supreme Court, which affirmed the judgment in Justice Van Dyke's opinion given in the record.

To recapitulate: Warner's Ranch consists of the entire San Jose Valley, including the premises in question; held under two patents. The southern half under a grant to Portilla, made the 16th day of April, 1836, patented to Warner, which included only that portion of the valley. The northern half, first granted in 1848 to Pico under the name of Agua Caliente; the grant not confirmed, and Pico abandoned it, and confirmation was made and a patent issued to Warner for that half, under a grant made to Warner in 1844, describing the entire valley.

POINTS AND AUTHORITIES.

The ultimate contention of the plaintiffs in error is that they or their ancestors were Mexicans who had property rights which are protected by the treaty of Guadalupe Hidalgo, and as such Mexicans that they are third persons, whose rights are preserved by the fifteenth section of the Act of March 3rd, 1851, and by the patent issued to Warner.

The plaintiffs in error to maintain this contention must establish three propositions:

1. That they or their ancestors had rights in this land, either granted by the Mexican government or acquired under it, which rights have been transmitted to the plaintiffs in error.

2. That they or their ancestors were Mexicans whose rights were preserved under the treaty.

3. If they or their ancestors ever had such rights that they or their ancestors were included within the class of third parties, whose rights were preserved by the Act of March 3rd, 1851, and the patent issued thereunder.

I.

NO RIGHTS WERE GRANTED TO OR ACQUIRED BY PLAINTIFFS IN ERROR OR THEIR ANCESTORS UNDER MEXICAN LAW.

California was conquered by means of Missions. The missionaries found the country pop-

ulated by Indians living in loose tribal relations, with but little attempt at any government, no agriculture, no pastoral property, living principally upon grass seeds, roots, grasshoppers, and mast; not exactly nomadic, but moving their villages here and there in search of food.

The Indians in question (Digger Indians) are a mixture of the Yuma and Shoshone races. They have no true tribal relations; they are merely a mixed race. (*Jaeger* v. *United States*, 29 Court of Claims, 172.)

Those of the plaintiffs in error who live at Agua Caliente speak the Cahuillas dialect, and are evidently of that race which made so many hostile attacks upon the Missions and the Mission property. The estimate in which the whole Indian race was held cannot be better shown than by the term applied to all other people of California, black as well as white, "gente de razon"—people of intelligence, which was used to distinguish and exclude the Indians from the human race. (Hittell's History of California, Vol. 2, p. 476.)

The missionaries established their Missions from the South to the North, a convenient day's journey apart, and called the Indians into their fold. The secular government followed the Missions and established praesidios in their aid. The Indians living outside of the Missions were

regarded as without the pale of the law. At the requisition of the missionary authorities the military would proceed in arms, break up outside Indian settlements, and drive the Indians at the point of the sword to the Missions. Here the Indians were assigned locations to establish their huts. No lands were assigned to the Indians for individual cultivation, nor cattle given them. They labored under the direction of the Mission to raise crops, which were garnered into the Mission granaries; they were detailed as herders of the common herds and liberal rations served out.

Thus, at the time of the secularization of the Missions in 1833, the majority of the Indians south of San Francisco had been gathered into the fold of the Missions, and those outside were regarded as hostiles.

The Mexican Laws Applicable to California.

The first regulation in regard to the Mission lands is to be found in the Viceroy's instructions to the commandant of the new establishments of San Diego and Monterey, August 17th, 1773, which is to be found annexed to Gen. Halleck's report in Rockwell's Spanish and Mexican law, page 444.

Article 12 directs "also even to distribute lands to such Indians as may dedicate themselves

to agriculture and the breeding of cattle, for having property of their own the love of it will cause them to radicate themselves more firmly."

Article 13 authorizes the granting of titles to individuals, whether Indians or new settlers. Provision is made, if desirable, to change the missions into pueblos. Here in the very organization of the Missions it was evident that the pueblo system was in the minds of the authorities. The other predominant feature is to encourage agriculture and agricultural pursuits on the part of the Indians, and for that purpose to grant them title to lands. Not a mere right to occupy lands which they were holding, but to treat them as the new settlers were treated. These decrees were never carried out by the Missions, nor became effective in California.

The colonization law of 18th of August, 1824 (see Appendix), with the rules and regulations therefor, are the basis of substantially all Mexican grants, the former does not mention the Indians or the Missions; but the rules and regulations of Nov. 21st, 1828 (see Appendix), provide, (Art. 17):

"In those territories where there are Missions the lands occupied by them cannot be colonized at present, nor until it be determined whether they are to be considered as the property of the establishments of the neophytes, catechumens, and Mexican colonists."

This was followed by the law of August 17th, 1833, for the secularization of the Missions of California, which made no provision for the cultivation of lands, but decreed that the Mission lands were vacant National property.

Gov. Figueroa's provisional rules of the 9th of August, 1834, for the secularization (Rockwell, p. 456), in some articles refer to the Indians. Thus article 16 compels the emancipated Indians to assist in the common labor. By article 17 they are to render to the missionary priests personal services; and by Article 23, subdivision 4, lots are to be divided to the Indians to cultivate. These lots are shown by Article 5 not to be land of the description of the property in suit, but lots in the neighborhood of the Mission, 400 varas square, to be assigned to each head of a family. By subdivision 9 it was directed that where the Indians were left in rancherias, at a distance, they should be formed into a pueblo and a like distribution made. It will be observed that there is no provision made either for the distribution of lands similar in character to the lands in suit, or for the reservation of any rights of occupancy on the part of the Indians who might be living thereon unless organized into pueblos. The evident intent was to reduce the Indians as nearly as possible to a civilized condition and to allot separate parcels of ground about some central community or pueblo to the Indians.

No trace of the rights claimed by the plaintiffs in error here, but of a diametrically opposite character.

The regulations of Gov. Alvarado of March 1st, 1840 (Rockwell, p. 466), also directs by Article 6 that the Indians shall assist in labor and shall be chastised for their faults. By Article 24 they cannot be let out to service without a positive superior order.

In Gov. Michaeltoreno's proclamation of the 29th of March, 1843, which restored the missions and the lands immediately contiguous to the missionaries, it is directed "that the dispersed Indians shall be gathered, both those who were legally emancipated and those in the service of private persons, who may return to the Missions with the knowledge of their masters and of the reverend missionary." In article 5 it is provided that no new grants will be made "without the information of the Reverend Padres, notorious unoccupancy, want of cultivation, or necessity." By the decree of the Departmental Assembly, May 28th, 1845 (Rockwell, p. 471), the government must designate the Indian lands, and Pico's regulation (Rockwell, p. 472) of October 28th, 1845, shows that the provisions in regard to Indians relate to the portions of the lands occupied by them about the Mission, where they have their gardens and a home; and even as to these it is directed as by the earlier decrees,

which we have recited, that the ownership thereof is to be adjudicated to them. In other words, they are to have title by grant; something which they could exhibit to show their claim of ownership. The same Article (Article 20) goes on to declare: "It being understood that they cannot alienate said lands, but they shall be hereditary among their relatives according to the order established by the laws." This expression in the regulations of Pico seems to be the basis for the declaration in Halleck's Report and in subsequent decisions that the Indians' title was not capable of alienation. Such was not the general law either of Spain or of Mexico, although there were strong safegrounds thrown around the manner of alienation.

The missionary scheme planned by the Court of Spain, included the reduction of the country to the domain of the Crown and the Church, the civilization of the native inhabitants and their formation into semi-self-governed communities, to whom homes could be allotted in severalty out of the lands of the community. The title of the property, within missionary jurisdiction, real and personal, still remained in the Crown, although, as one writer says, facetiously, "the property belonged to the Indians and, as the Indians belonged to the padres, it belonged to the padres," but neither had any legal right of ownership even in the land upon which the missions stood. They

held it for the purpose of christianizing and civilizing, and according to the original scheme, secularization would eventually come. That meant an organization of the neophytes into pueblos and the allotment of lands, the appointment of priests, under the jurisdiction of the Bishop, and the termination of the missionary system. Nowhere was it contemplated that the aboriginal rancherias should be maintained. The whole plan was destructive of the aboriginal system, which was to be destroyed, in order to build upon it the system conceived by the Court of Spain.

This plan, so far as the Indian pueblos were concerned, was a dismal failure in California. Croix's scheme on the Colorado river was a complete wreck (Bancroft, Vol. 18, p. 457). The experiments tried under the secularization law of 1833, on the coast side, were not more successful. Only one mission was organized into a pueblo, that of San Juan Capistrano, and this pueblo disappeared. A little further down the coast, under the jurisdiction of San Luis Rey, an attempt was made to form a pueblo at Las Flores, which failed, and the members of the community surrendered their title to Pio Pico, and the transaction was affirmed by this Court (*U. S.* v. *Pico*, 5 Wallace, 536) as a part of the Santa Margarita y Las Flores grant. The Indians at San Luis Rey were unanimously opposed to forming a pueblo

(Bancroft, Vol. 20, p. 332). The records of the Missions show that after, as well as before secularization, the neophytes were driven back by force to their huts about the Mission itself. Another attempt from San Luis Rey to found a pueblo at a distance from the Mission, was at San Pasqual. The history of this pueblo, in whose village Kearney fought the battle of San Pasqual, is well told by Professor Blackmer in his "Spanish Institutions in the Southwest" (p. 146). There he illustrates the whole subject, showing that the Indians never had any possessory rights in the land which were recognized either by the Spanish, Mexican or American governments; and this was the case of San Pasqual, where the United States government deprived the Indians of the most thoroughly organized Indian pueblo which ever existed in the state of California, of their rights of occupation. The story is also told by Mrs. Helen-Hunt Jackson in "Ramona," for she locates the home of Allejandro and Ramona in this pueblo. The only remaining attempt was at San Dieguito, still further south, near the San Diego Mission, and here, too, against the protest of the Indians, the land was granted, first to Silva and then to Osuna, by the Mexican government, and the latter's rights sustained by the United States authorities as against Indian occupation.

Agua Caliente and San Jose were never organ-

ized as pueblos, and were never recognized as Mission ranchos (Brancroft, Vol. 20, p. 624), although they may have been occasionally occupied for Mission purposes, and even those ranchos mentioned by Bancroft have passed into private ownership and the Indians excluded from their occupation. Had the Indians at Agua Caliente been Mission Indians they would have been gathered either at the Mission, or at Santa Ysabel or Pala. The fact that they were not, shows that they were not treated as dispersed Indians, or hostiles.

After the secularization some of the Indians remained at the Missions, others scattered as laborers in the pueblos and ranchos; the majority lapsed into barbarism, and went into rancherias in the mountains. Of those who remained at the Missions, some cultivated lands for themselves, which may have been in some instances alloted under the regulations.

Those "*emancipated Indians*" who left the Missions and settled elsewhere, *acted in defiance of the regulations, and could found no rights on their acts so committed.*

Wherever lands were petitioned for in the neighborhood of Missions, the Mission authorities were cited to show cause why the grant should not be made (see Gov. Micheltoreno's proclamation), and they were again cited as

colindantes, when judicial possession was given.

When a grant was made without special reservations in favor of the Indians, it must be presumed that there were no valid Indian claims.

The law cited by counsel and Court in *Byrne* v. *Alas*, 74 Cal., 633, had reference to Indian proprietorship *where there were India Pueblos*, and not to such a state of affairs as existed in California, where they could only apply to Mission lands; to that extent the opinion in that case is, perhaps, founded properly upon them, but as to other lands it is otherwise.

The law of 1828 provided for the granting of vacant lands, and for the method of ascertaining whether the lands petitioned for were vacant.

Numberless expedients show how the inquiry was made through the respective Ayuntamientos, and how, thereafter, the *colindantes* were summoned to the judicial possession.

No Indian Pueblos existed in California; no recognized Indian settlements but those authorized by the Missions, so that when a grant of non-Mission lands was made, having any Indian settlements thereon, the grant must be held to be and was authorized by the Missions, and that it was the intention to remove the Indians to the Missions.

In the case at bar the Warner Ranch Indians were mere outside barbarians—incapable of ownership and incapacitated for civilization.

Warner's grant shows that the land was vacant, the assent of both the San Luis Rey and San Diego Missions was obtained, and the approval of the Departmental Assembly (Tr., fol. 44-45) shows that all the proceedings had been duly had "in conformity with the law of the 18th of August, 1824, and the Article 8 of the regulation of the 21st of November, 1828."

It must also be remembered that it was the practice of the Missions to farm out Indians to Vicinos of the pueblos and rancheros, and that there would always be a number of such Indians on every rancho.

"There will be found in the works cited no account of the quasi-Christianized Indians of the Missions. Their aboriginal customs have so faded out, their tribal organizations and languages have become so hopelessly intermingled and confused that they can no longer be classified." Stephen Powers' Contributions to North Am. Ethnology, Vol. III., p. 116.

That this should be the case in such a short time (less than a century) shows that the Indians of Southern California had no cohesion, no real tribal or governmental organization. Note how persistent have been the *Indian Pueblos* wherever they have existed. How they are today extant in New Mexico carrying out their own laws and peculiar policy.

Bancroft shows how the outside rancherias were treated as hostile *gentiles* without the pale of the law.

Nor can there be any doubt of the power to make the grant to Warner without any reservation of rights to Mission Indians. Discussing the decrees which we have cited, this Court say:

"Under these laws, the authorities empowered to grant the public lands have dealt with these Mission establishments the same as with any other portion of the public domain; the clergy, who previously had the charge and control of them, being confined simply to the ecclesiastical and spiritual direction and government of the Missions." (*United States* v. *Ritchie*, 17 How., 525.) In a later case the Court affirmed the case of Ritchie, and further decided that the right of the missionaries and the Indians to the occupation of the land was at the will of the sovereign and terminated with the grant. In that case the Mission had apparently assented to the grant as to Warner's grant.

"The large tracts of land appurtenant to the Mission establishments were never vested in the Church, or any other corporation or individual by any grant of a legal title. The missionaries and Indians had an usufruct or occupancy of the land at the will of the sovereign. The record shows that, though the lands now in

question had formerly been occupied by the Mission, they were not so at the time this grant was made. It was made, also, with the assent of the Mission, who set up no claim to further occupancy.

The 17th section of the Regulations of 1828 forbid lands occupied by Missions from being made the subject of colonization grants for the present, &c., and can therefore have no application to lands not so occupied and not made the the subject of colonization. Besides, in 1833 and 1834, the government of Mexico passed laws to secularize the Missions; since which time the public authorities have granted these lands to individuals in the same manner as other public lands, as has been decided by this Court in the case of *United States* v. *Ritchie*, 17 How., 525."

United States v. *Cervantes*, 18 How., 553.

And this power and practice have been recently reaffirmed by this Court.

"This was in accordance with the general rule that the missionaries and the Indians only acquired a usufruct or *occupancy at the will of the sovereign*."

Faxon v. *United States*, 171 U. S., 244, 259.

The assent of the Mission was in effect obtained by the notice required of the proceeding in which they had the right of protesting before the supreme government that in a particular

grant the neophytes' prospective needs had been ignored. (Bancroft, Vol. 23, p. 562).

The Spanish Law.

Having given all the Mexican laws and regulations applicable to this grant, and called attention to every reference to the Indians, let us now review the decrees made by Spain previous to the Declaration of Independence, and in doing so we will give every reference to the rights of Indians which we have been able to find.

The first is in the Cedula of November 1st, 1591, the first royal disposition of lands in Mexico. It ordered distribution to Indians as well as Spaniards. "To the Indians what may be necessary for them to sow, cultivate and to raise stock." Provision is made for the compromise and grant to the possessors (amongst other lands) of Indian farms (*chacaras*) and for a new confirmation to their possessors. Indians, to whom distribution is made, are those who have fields which they sow and cultivate and upon which they raise stock.

The general laws in regard to the disposition of Crown lands collated in the Recopilicion de la Indias, and published by royal decree, May 18, 1680, Book 4, Title 12, provide for the distribution of Indians to the holders of grants, "in order that they may enjoy their profits and

labors in conformity with the taxes and what is ordered."

Law V, which evidently deals with the apportionment by pueblos, decrees, "that to the Indians should be left their lands, cultivated lands and pastures, in such a manner that they may not lack what is necessary, and that they have all the comfort and repose possible for the sustenance of their houses and families."

Laws VII and IX. The apportionment shall be without distinction of persons or prejudice to the Indians.

Law XIV, provides for the confirmation of lands to the Indians of what may be necessary for them to cultivate and to sow, and to raise cattle, and for appointment of a competent term in which should be exhibited the titles of lands, including Indian farms.

Law XVI, allows the Indians to present their claims; citation and examination of witnesses is provided for "and the titles which shall be given to the interested parties must bear our confirmation, with the original terms which is observed in the grants of assignments of Indians."

Laws XVII and XX. The *fiscales-protectores* are directed to prosecute the rights of the Indians where Spaniards have acquired rights by contract with them contrary to the orders of the cedulas and ordinances. Unconfirmed grants are to be revoked and the lands returned to the Indians.

Laws XVIII and XIX. Lands which are to be left to the Indians, "as well to the individual Indian as to the communities", and waters and places of irrigation, and the lands in which they have made ditches for irrigation, or any other benefit with which, by their personal industry they have fertilized, shall be reserved in the first place, and in no place can they be sold or alienated; and communities of Indians are admitted in preference to individuals. And provision is made for the judges specifying the Indians in possession of the land and the lands which are set aside.

The exact time when these decrees were made is not certain. The references give dates from Ferdinand V., June 1513, to Philip IV., June 30th, 1646. In any event, they exhibit the law prior to the year 1680 and show that even at that date the rights of the Indians were to be authoritatively defined and granted to them by recorded grants, and when so marked out and granted, their rights were to be carefully preserved and that whatever rights the Indians had in the lands were rights of the same character and of equal dignity with those of Spaniards, to whom grants were made. Moreover, they show that it was the Indians of the pueblos and individual Indians, of like character, who were, at least, in a semi-civilized condition, to whom grants were made and whose rights were protected. They were

those who tilled their fields, who raised cattle and who had artificially irrigated lands. The Cedula of June 4th, 1687, which somewhat modifies the provisions of the laws cited, shows that the object of the provisions which we have given was to create and care for Indian pueblos. This Cedula and others which follow it show the contest which had already arisen between the ranchers and the Indians, and that the royal intention was to protect the Indians so long as they lived in the pueblos organized and duly assigned to them under the royal decrees. Their rights were fully protected, for in all grants of land notices were posted in the Indian tongue and read in their presence, and testimony was taken to determine whether an Indian pueblo had any right to the land. In the Cedula of October 15th, 1754, which dispensed with the necessity of confirmation of grants by the king, confirmed titles previous to 1700 and provided for the presentation of titles for confirmation, the only reference to Indians is in Section 2, which provides for the maintaining of the *Indians of the pueblos* in the possession of their lands and the extent of those lands are according to the exigencies of the population. The same section provides for a like leniency toward the Spaniards and the other casts as to the lands which they possess. A most important decree under the Spanish regime, is that of the 4th of

January, 1813, the pertinent parts of which we print in the appendix. This decree, although suspended for a time, continued in force during the Spanish dominion and provides for the reduction of all common lands to private dominion; that the titles shall be in fee, with the right of enclosure, "without prejudice to the sheep-walks, cross-ways, watering places, and services, and to enjoy them freely and exclusively", a declaration of the utmost importance, since it declares, first, that all vacant land is subject to grant and that the title, when granted, is to be in exclusive ownership, with the right to exclude all others, subject to the rights of way and water. We also print in the appendix the decree of the 13th of September, 1813, which shows that the chief purpose of this decree was to deal with provinces of regular Indian pueblos. It had no application to California, where it would have at once secularized the Missions had it been a province of *Indian pueblos;* but the Missions of California were not missionized Indian pueblos. This is the concensus of all the authorities. The Indian settlements had been created by the Missions, and, furthermore, there were, as yet, no secular clergy in California.

We repeat, that it is notorious that prior to 1833 there was no cultivation of the land by the Indians in California, save at the Missions.

After 1833 the only cultivation was at the Mis-

sions, and by Indians who had left the Missions.

In 1833 the Mission Indians were called *emancipated*, but had no permission to leave the Missions and take up outside lands; if they did so, it was contrary to law.

The Peculiarity of the Warner Ranch Indians.

If the Missions ever exercised any control over those with whom we are now contesting it is not apparent. The testimony introduced for the purpose of showing the peculiarities and characteristics of the defendants does not support this appeal. The evidence of two Indians of unpronounceable names is to the effect that in ancient days crops were taken to the San Luis Rey Mission (Tr., fol. 83). A venerable Warner Ranch female named Sivimoat informs us that she remembered when the padres of the San Luis Rey Mission had charge of the Indians at Agua Caliente (Tr., fol. 83.) Warner testifies that when the priestly authority ceased the Indians dispersed. (Tr., fol. 77.) They worked about the country, gathered acorns, stole sheep, and lived otherwise in accordance with the practices of the day. (Tr., fol. 77.) These wandering and worthless beings are supposed to possess paramount proprietary interests in land already granted by the United States and in no way protected by treaty stipulation or statutory en-

actment. Colonel Warner found it necessary to kill a few of these savages. (Tr., fol. 80.) If the Mission Fathers had anything to do with the Agua Caliente establishment the connection ceased very early. (Tr., fol. 74.) Military forces were necessary to subdue them. (Tr., fol., 65.) Mr. Swycaffer says that he and his military associates killed some Indians. (Tr., fol. 65.) He affirms that the right men were shot, adding: "It's always the right ones." Swycaffer undoubtedly felt that no mistake could be made with reference to an incident of this kind where the Agua Caliente Indians were concerned. The natives eat seeds, acorns, etc. (Tr., fol. 66.) They occasionally eat rats.

Gen. Emery in his Notes on a Military Reconnoisance, Senate Executive Document 7, Thirtieth Congress, first session, page 105, gives a graphic account of the situation of the rancheria in December, 1846. It was in charge of Marshall, then the foreman of Warner. He describes it with the thatched huts of the half-naked Indians, "who are held in a sort of serfdom by the master of the rancheria", surrounding Warner's house.

The defendants do not belong to civilization. They must be attended to, it is true, and protected, but they cannot interfere with the effect of a patent of the United States. The

United States cannot saddle upon the patentees of a Mexican grant an obligation not written in the instrument which the government has issued in confirmation of a claim made.

The obligation to protect the Indians is purely a moral one and devolves upon the government. It has nothing to do with the effect or strength of a Spanish or Mexican grant. The Indians are being well treated; but if it were otherwise the controversy would not be affected, for, whatever may be the moral obligations of the United States, and it is to be assumed that the same will be adequately discharged, it is obvious that no such public burden can be lawfully placed upon the shoulders of the individual citizen.

THE MICHAELTORENA GRANT TO WARNER, BASED ON THE FINDING OF THE PREFECT THAT THE LANDS WERE VACANT AND ABANDONED, IS AN ADJUDICATION THAT THE INDIANS HAD NO RIGHTS IN THE PREMISES GRANTED.

Conceding that a grant containing the clause found in the grant to Pico to the effect that "the grantee shall not molest (*prejudicar*) the Indians that thereon may be established," would preserve the rights claimed for the plaintiffs in error in the premises, the fact that Warner's grant contained no such reservation is a binding adjudication that no such rights existed. It was

an act of the political department of the government, but judicial in its character, for the determination of the fact which is here in controversy. The record in this case shows that the grant to Pico made in 1840 contained that clause. The reasons are evident upon the face of the expediente. Pico says in his petition that he wished to settle alongside of the Indians,with whom he seems to have some agreement. And the evidence of Don Juan Foster is that Pico employed the Indians in setting out his vineyard on the premises in controversy. (Tr., fol. 55.) On the other hand, the expediente of the Warner grant shows that the premises had been "abandoned on the ground of the many robberies on the part of the wild Indians" (Tr., fol. 41); and was in due course forwarded to the head of the San Diego Mission, Father Olivas, who reports that it belongs to the Mission of San Diego, which has no means to cultivate and occupy the land, and it is not necessary to the Mission. The Juez de paz at San Diego, authorized to act as Prefect under the order of Nov. 14, 1843, thereupon the next day found and certified that "the said Valle San Jose is and has for the last two years been vacant and abandoned * * * but said place belongs at the present time to said Mission." (Tr., fol. 41.) Moreover, it can not be said that the rights or interests of the San Luis Rey Mission were overlooked. They

were scrupulously provided for (Tr., fols. 40, 44, 45.) Warner, whose attitude towards the Indians all through is hostile, testifies that he arranged satisfactorily with the Mission. (Tr., fol. 80.)

The labored argument made that Warner only petitioned for the south half of the valley and not for the north half, which was confirmed to him, fails in view of the repeated declarations cited showing that the San Luis Rey Mission property, which was situated in the Indian village (Tr., fols. 56, 69) was to pass to the possession of Warner.

As was said by Mr. Justice Baldwin upon a question as to the validity of a grant of Indian lands in Florida:

"This seems to be a mode of proceeding known to the Spanish law in force in the province, in the nature of an inquest of office, as a judicial act * * * whether from the nature of the Indian right of occupancy it had in law and by the actual condition of the land, in fact, reverted to and become reannexed to the royal domain by the abandonment of the occupancy * * * This is a matter which we feel bound to consider a judicial one and that we cannot look behind the final sentence of the authorized tribunal to examine into the evidence on which it was founded, but must take it as a *res adjudicata* by a foreign tribunal judicially known and to be respected as such. Similar proceedings are directed by the various acts of Congress, the Land Commissioners, the officers of the Land Office, as the case may be, confirming the claims to the

lands embraced in the rejected claims reverts to the public fund. So it is provided by the 7th section of the Act of 1824, as to claims barred by not being duly presented or prosecuted, or which shall be decreed against finally by this Court."

United States v. *Arredondo*, 6 Pet., 691.

This Court has no jurisdiction to revise the acts of a political department of the Mexican government done by authorized officials in the course of a regular proceeding; the action of the Mexican authorities settled this question forever, as has been declared again and again by this Court in decisions which we will hereafter cite. The only questions which can be raised by a person denying the validity of the act are power in the officer or fraud in the party. There is no pretense of lack of power in the Mexican officials, and there are no allegations or evidence in the proof of fraud in the party. The action of the Mexican government, therefore, is a conclusive adjudication that the lands were vacant and that Warner was entitled to the exclusive occupation of the grant.

Plaintiffs in error claim that their rights are preserved by the reservation in the Pico grant. Our answer to this is that the land for which Warner petitioned covered that included in the so-called Pico grant; that the Land Commissioners decided that the Pico grant was void, and that the Warner grant, which described the

whole valley of San Jose was confirmed. In this case the same testimony was before the Court upon the rights of the Indians. (Tr., fols. 55-58.) This decision was affirmed by the District Court on appeal, and in a controversy between Pico and Warner the Supreme Court of California held that Warner obtained nothing in the Pico grant.

"Whether the grant to Warner was properly located or not on land previously covered by the grant to Pico is a matter which does not concern the plaintiff. When that grant was confirmed it became the duty of the government to locate it, and it must be presumed to have performed that duty properly. The plaintiff had no interest in the grant or in the land selected under it, and he cannot therefore be heard to question the government's action."

Pico v. *Warner*, 73 Cal., 17.

If Pico had no interest in the Warner grant then *a fortiori* those who had rights under his grant could have no interest in the land in controversy.

SERVIDUMBRES.

The remarkable claim is made by plaintiffs in error that their rights are preserved in the words "servidumbres" contained in the grant. The language of the grant (Tr., fol. 43) is as follows:

"He will be allowed to fence it in, without interference with the roads and other usages (servidumbres.) *He will hold it freely and exclusively*, turning it to agriculture *or any other use*

he may please, and he shall build a house upon it within one year and live in it." Plaintiffs in error contend that the word usages or "servidumbres" refers to the Indians. This conclusion seems untenable. The sentence quoted declares the character of the reservations. It will be noticed that roads were reserved. It matters but little how "servidumbres" is construed. The phrase can only refer to burdens of a similar character to highways. It is intended to cover "sheep walks, cross ways, watering places and services," reserved in the decree of January 4, 1813. This is a clause which we believe was contained in all grants, and we would not dignify the contention with extended argument but for the fact that the learned Chief Justice of the Supreme Court of California in his dissenting opinion holds "that the word 'servidumbres' had a meaning in Spanish law broad enough to include the servitude corresponding to the right of occupancy claimed." Whether this view was shared by Mr. Justice Temple and Mr. Justice McFarland does not clearly appear, but we think nothing is more certain than that rights such as are claimed here by plaintiffs in error cannot be included within the term 'servidumbres' as it was known to the Spanish and Mexican law. We give in the appendix all that is important of Part Third of Title 31 of Las Siete

Partides, using the translation authorized by the legislature of Louisiana, also found in Hall's Mexican law. An examination of this shows that the usages which are intended by this grant are what are called *rustica*, or rural service. A path (*senda*), a carriage way (*carrera*), a road (*via*), are the rural services described in Law 3, and it is the sheep walks (*canadas*) which undoubtedly are intended under the head of servidumbres. If not, then it is a right to water found in Laws 4, 5 and 6.

The contention that the servitude can be a personal service or a *usufruct*, as claimed by plaintiffs in error, involves a curious ignorance of civil law.

A usufruct under the civil law in its highest estate is no more than what under the common law is called a chattel real and therefore not an estate of inheritance. (Kent's Commentaries, Vol. 2, p. 342).

"*Usufructuary, in Civil Law.*—Domat points out the duties of the usufructuary, which are—to *make an inventory* of the things subject to the usufruct, in the presence of those having an interest in them; to *give security* for their restitution when the usufruct shall be at an end; *to take good care of the things* subject to the usufruct; *to pay all taxes* and claims which arise while the thing is in his possession as a ground rent; and to keep the thing in repair at his own expense."

Bouvier's Law Dictionary, Vol. II, p. 1183 (Rawle).

"*Servitude, in Civil Law.*—When used without any adjunct, the word servitude means a real or predial servitude. *Lois des Bat.* p. l., c. l.; Mitch. R. E. & Conv., 49. Real servitudes are divided into rural and urban.

Rural servitudes are those which are due by an estate, such as the right of passage over the serving estate, or that which owes the servitude, or to draw water from it, or to water cattle there, or to take coal, lime and wood from it, and the like."

Bouvier's Law Dictionary, Vol. II, p. 986 (Rawle).

It would be as reasonable to interpret the word "servidumbres" in this grant as personal servitude or slavery, which is its primary definition, as that a usufruct was intended, which under the Spanish and Mexican law was created by a grant or will of the owner of property, and must be less than a freehold.

It is not contended that the rights of the defendant can come under any class than that of usufruct, and this by law 20 is as follows: "The first is where one man grants to another, for the whole of his life, or for a certain time, the usufruct of his estate, house, slaves or cattle, or other things which afford a revenue or fruits. This usufruct may be granted either by contract or will. But the grantee ought to gather the fruits in good faith, first giving security that the land of which he has the usufruct, shall not be lost or deteriorated by his fault, or by gathering therefrom more

than it is proper he should take; and that in case he should die, or the time of his usufruct expire, in any other manner, the thing shall be restored to the grantor, or to the person to whom he might order it to be restored, or to his heirs, if he be dead."

Who has, by contract or will, given these Indians or their ancestors any usufruct in these premises? To whom have they given security that it shall not be lost or deteriorated, and if it was given at all then it has expired years ago by the death of the original possessors, for law 24 explicitly provides that it terminates on the death of the grantee.

The rights claimed by the plaintiffs in error are merely those of permissive occupation of the tract. If any such exists, they are similar in character to those involved in the De Haro case, of which the Court say:

"There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas, a license is a personal privilege; can be conferred by parol or in writing; coveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death

of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it."

De Haro v. *United States*, 5 Wallace, 599; *Bixby* v. *Bent*, 59 Cal., 522.

II.

NO RIGHTS OF ANY KIND WERE RESERVED TO THE INDIANS UNDER THE TREATY OF GUADALUPE HIDALGO.

While it is true that the laws of the United States govern, whether they are or are not consistent with the terms of the treaty, nevertheless since it has been so often said that the Indians have rights under the treaty, it may be well to refer to that instrument. The Treaty of Guadelupe Hidalgo and the subsequent protocol adopted at Queretaro, can be found in "Treaties and Conventions of the United States," constituting Senate Executive Document Number 47, Forty-eighth Congress, second session, pages 681-693, and we print in the Appendix the pertinent parts. The eighth article provides that Mexicans then established in the ceded territory were free at their option to remove therefrom and to retain the property which they possessed therein; and that in the ceded territory property of every kind "now *belonging to the Mexicans* now established there, shall be inviolably respected." The ninth article specifies that all

Mexicans who shall in accordance with the eighth article become citizens of the United States shall be protected in the free enjoyment of liberty, property, etc. The protocol declares that by substituting the third article of the Treaty of Louisiana it was not intended to diminish what was agreed upon in Article nine, *supra;* and it was further recited that the understanding of the American government "is contained in the third article of the Treaty of Louisiana. In consequence, all the privileges and guaranties, civil, political, and religious, which would have been possessed by the inhabitants of the ceded territories if the ninth article of the treaty had been retained, will be enjoyed by them without any difference under the article which has been substituted."

It is also said in the same protocol that "The American government by suppressing the tenth article of the Treaty of Guadalupe did not in any way intend to annul *the grants of lands* made by Mexico in the ceded territories. Those grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the *grantees may cause their legitimate titles to be acknowledged before the American tribunals.* Conformably to the laws of the United States legitimate titles to every description of property, personal and real, existing in the ceded territories, are those which *are*

legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, etc."

The third article of the Treaty of Louisiana is as follows:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." (Treaties and Conventions, page)

No mention is made in the Treaty of Guadalupe Hidalgo of the Indians except in so far as they are referred to as savages and provision made for mutual protection from their incursions.

The Gadsden Treaty (Treaties and Conventions, page 694) contains nothing affecting the question before us.

It will thus be observed that only the *grantees* of the Mexican government were protected, and that the mere right of occupancy, if any such existed, of Indians, and the general treatment of the savage tribes found no countenance or recognition whatever. Nor is this at all singular. The peculiar system prevailing in Mexico, and the political regulations which that government

saw fit to adopt as to Indians, were not in harmony with the views of the United States; and the latter never undertook to carry out, maintain, or recognize the Mexican plan of dealing with Indians to any extent or at all. We have pursued our own notions in this respect, and whether our plan is or is not a wise one is wholly immaterial. There is no doubt that the Spanish government assumed to conserve certain rights of Indian communities in the field of its American conquests.

White on Indian Sales, 2 White's Recop., 703, *et seq.*

But, says Mr. White, "Book 5, Chap. 16 (Recop. de Las Indias), is on the subject of laws, and goes to show the impossibility of dictating rules to suit every people of the monarchy, and how much must be left to the governors." (Id. p 704).

Thus, in some cases where the country was occupied by independent Indian nations, claiming by boundaries, the title of these nations was recognized, which title had to be extinguished by purchase or cession, before the Spanish grantee could legally obtain possession and title. So it was in Florida and Louisiana, as appears from the citation from White above referred to.

In other places Indian nations were extinguished by conquest, and there remained village communities and individual proprietors, and the

balance of the lands became crown lands. Such, for instance, was the case in New Mexico, and certainly in the valley of Mexico.

Over vast territories roamed predatory tribes who had no fixed habitation. They were not considered as having any proprietary rights, and all the land treated as realengus.

Therefore, we find in all the laws and decrees of "Coahuila and Texas" only the following with regard to Indians:

"The Indians of all nations *bordering* on the State, as well as the wandering tribes *within the same*, shall be admitted in market exempt from all duties in their traffic in the effects of the country; and should any of the same, being attracted in this manner, and by the mildness and confidence with which they shall otherwise be treated, wish to establish themselves in any of the settlements, after declaring themselves in favor of our institutions and religion, they shall be admitted, and share the same quantity of land as the settlers specified in Articles 14 and 15, always preferring native to foreign Indians."

Colonization Law of March, 24th, 1825,

Art. 19;

White's Recop, Vol. 1, p. 456.

None of the laws, ordinances or contracts with regard to Austin's Colony mentions the Indians save by the Art. 19 above specified. No proprietory rights were recognized in the Indians in this vast territory, and hence, there has never been any question of the extinguishment of any Indian title in the Texas courts.

We have already discussed at length the character of the California Indians and shown that there was nothing in their character or condition which would bring them within the terms of the treaty or would preserve their rights. Our proposition is a very simple one. There is no question that a civilized Indian could take under a Mexican grant: *U. S.* vs. *Ritchie*, 17 How. 525, where this Court held that Solano, the grantee in that case (who was a civilized Indian) under the plan of Iguala and the decrees of the Mexican Congress, was a citizen of the Mexican government and competent to take, hold and convey property, and that the Mexican constitution makes no distinction between the Indian and white race in regard to citizenship. Our contention is, that if they come within the term Mexicans, then any rights which they may have must be presented under the Act of Congress March 3rd, 1851; but if their rights grow out of the fact that they were a class dependent on the grace of the government and not bound by the provisions of that act, then they never acquired any rights under the Mexican rule preserved by the treaty, or if they acquired such rights they are lost by the action of our government. No decision is cited or can be cited to show that any rights of this character were preserved by the treaty. It is true, as Chief Justice Marshall declares in *Johnson* v. *M'Intosh*, 8

Wheaton, 543, that the Indians have been held under the system prevalent in the United States to have a just right to retain possession of the soil which they occupy, while the ultimate dominion and the power to grant the soil, although in possession of the natives, rested in the United States; that the right of discovery drew after it as an incident the right of dominion and the right to parcel out and give title to land according to the discretion of the power which held dominion; and that Spain, while she rested her title on the grant of the Pope, yet insisted also on her rights by virtue of discovery; but the decrees which we have cited show that she dealt with the Indians in the exercise of this dominion, distributed them to the holders of grants "in conformity with the taxes," respecting and encouraging their settlement in pueblos and wherever they were adopting the habits of civilization, but nowhere recognizing any right in the soil in nomadic tribes, and that Mexico, after her Declaration of Independence, has recognized no rights in the Mission Indians whatever, except in certain allotments of Mission lands. There is no allegation that this was an allotment of any Mission land or that any such rights were acquired by these Indians, or under the colonization law of Aug. 18, 1824, the regulations of Nov. 21st, 1828, the law of Aug. 17th, 1833, or the rules and instructions thereunder, and if any

such rights were acquired and were preserved by the treaty, then it was as much the duty of these Indians to present their rights as any other Mexican.

It was only grants, and grants which had been perfected that were protected by the treaty of Guadalupe Hidalgo. The care with which our government maintained this contention is shown by the unanimous rejection by the Senate of the 10th article of the original treaty, the circumstances of which are stated by Mr. Justice Lamar in an opinion sustaining the proposition we have announced.

Interstate Land Co. v. *Maxwell Land Grant Co.* 139 U. S., 569.

III.

THE PLAINTIFFS IN ERROR ARE NOT THIRD PARTIES WHOSE RIGHTS ARE SAVED BY THE ACT OF MARCH 3, 1851, BUT THE PATENT AND THE PROCEEDINGS LEADING UP TO IT ARE CONCLUSIVE AGAINST THEM.

We have shown, as we think, that the plaintiffs in error had no rights in the land in question under the Mexican and Spanish rule; that the Indians whose rights were preserved by the Spanish decrees and Mexican laws were of a different class; that the Indians in question were either Indians outside the Mission jurisdiction, and not within the class of Mission or Pueblo

Indians; or if they were Mission Indians then they could acquire no right of occupation in the soil unless by some grant or allotment, which is not shown in this case; that lands of this character, whether formerly occupied by the Missions or not, were subject to grant; that the grant was made; that the Valle de San Jose was adjudicated to be vacant and Warner put in possession; that no reservation was made of any rights of the Indians; and that if they had any right which the Mexican government could enforce, it was of a character which was not protected by the treaty.

There but remains to consider the ground upon which the trial court decided the cause and which was affirmed by the judgment of the Supreme Court of California in the able and exhaustive opinion of Mr. Justice Van Dyke:

"That we are not permitted to go behind the patent is a case like this."

"Neither the grant nor the patent contains anything to support this contention, and there is no privity between them and the grantee, or anything from which a trust could arise in their favor as against his grant or the patent issued thereon. They are not third persons within the meaning of the fifteenth section of the act of 1851, as already shown, but are mere strangers to the record." (*Harvey* v. *Barker*, 126 Cal., 277.)

It hardly seems necessary to add anything to

the opinion of the Court, which disposes of the little which was left of the case of *Byrne* v. *Alas*, upon which plaintiffs in error relied. That case had been already practically overruled by the Supreme Court of California, and the Supreme Court of California in deciding this case held that it could no longer be considered as authority, and showed that the facts in the case of *Byrne* v. *Alas* differed materially from the case at bar, for in *Byrne* v. *Alas* the grant contained a reservation of the rights of the Indians, which is entirely wanting in the grant to Warner.

As the patent was issued in accordance with law it must be construed as to its efficacy, not by the laws of Mexico, but by those of the United States, and it is not in the power of this tribunal to declare that any legislation had by Congress in the execution of treaty rights of the treaty is violative of constitutional power.

In *Botiller* v. *Dominguez*, 130 U. S., 238, it is said:

"Two propositions under this statute are presented by counsel in support of the decision of the Supreme Court of California. The first of these is that the statute itself is invalid, as being in conflict with the provisions of the Treaty with Mexico, and violating the protection which was guaranteed by it to the property of Mexican citizens, owned by them at the date of the treaty; and also in conflict with the rights of property under the constitution and laws of the United

States, so far as it may affect titles perfected under Mexico. The second proposition is that the statute was not intended to apply to claims that were supported by a complete and perfect title from the Mexican government, but, on the contrary, only to such as were imperfect, inchoate, and equitable in their character, without being a strict legal title.

"With regard to the first of these propositions it may be said that so far as the act of Congress is in conflict with the Treaty with Mexico, that is a matter in which the Court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon another the obligations of a treaty. This Court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. The Cherokee Tobacco, 78 U. S., 11 Wall., 616; *Taylor* v. *Morton*, 2 Curtis, 454; Head Money Cases, 112 U. S., 580, 598; *Whitney* v. *Robertson*, 124 U. S., 190, 195."

There can be no issue here as to what the law of Mexico authorizes, unless that law was carried into and made a part of the statutory enactments of the United States. The United States as a sovereign had the power to do whatever it chose with the property acquired from Mexico regardless of any treaty stipulations.

Stephens v. *Cherokee Nation*, 174 U. S., 445.

Thomas v. *Gay*, 169 U. S., 264.

Choctaw Nation v. *United States*, 119 U.S., 1.

Whatever moral obligation on the part of the United States there may be, its power to deal with the Indians and grant title to their land without their consent is undoubted. The same great Judge who delivered the opinion in *Botiller* v. *Dominguez* has vindicated this principle in discussing the power of Congress to deal with the Indians irrespective of treaty compact relations.

United States v. *Kagama*, 118 U. S., 375.

And this Court has declared that even against the consent of the Indians who were parties to the treaty the power exists in Congress to invade the sanctity of a reservation and disregard the guaranties contained in the treaty, and dispose of the land included in the reservation.

Spalding v. *Chandler*, 160 U. S., 394.

The same proposition has been affirmed by this Court in reference to grants to railroads given not only the fee but the right of possession.

Missouri, K. & T. R. R. v. *Roberts*, 152 U. S., 114.

And in terms laid down by Judge Hanford in the District Court.

United States v. *Alaska Packing Co.*, 79 Fed. Rep., 152.

United States v. *Four Bottles Sour Mash Whiskey*, 90 Fed., 720.

Mr. Justice Miller, in his opinion already cited (130 U. S., 243), says: "This was a transfer of the political dominion and of the proprietary interest in this land; but the government of Mexico had caused to be inserted certain provisions intended for the protection of private property *owned by Mexicans*" (not claimed by Indians) "within this territory at the time the treaty was made; and it may be conceded that the obligation of the United States to give such protection, both by this treaty and by the law of nations, was perfect."

This obligation referred to by Mr. Justice Miller was, of course, a moral one only, incapable of enforcement except save through appropriate action by this government. (See opinion p. 247.) It is manifest that the object was to protect those Mexicans who actually *owned* an interest in property in this country under the then existing laws, *and that neither treaty or Congressional act* was designed for the benefit of the Indians who did not own such an interest.

Here, therefore, is the obligation upon all who claim *any* right or title to present the same.

If the Indians ever had any valid claim, which we deny, they could not escape this requirement. And this is further shown in the opinion of Mr. Justice Miller already cited. He proceeds to show by Article XI of the Treaty of Guadalupe Hidalgo the character of California at the time

of its colonization: "In a wild state of nature, with very few resident white persons, and very little land cultivated within its limits"; to show the change brought about by the discovery of gold and the necessity of settling the validity of claims of private individuals within its boundaries, for which purpose the Act of March 3, 1851, which was entitled, "An Act to Ascertain and Settle the Private Land Claims in the State of California," was passed, the first section of which declares it is for the purpose of ascertaining and settling private land claims, and the eighth "that *each and every person* claiming lands in California by virtue of *any right or title derived from the Spanish or Mexican government shall present the same* to the said Commissioners." (Italics are those of Mr. Justice Miller.) That this imposed an objection upon all who claimed *any right or title to present the same.* This conclusion is fortified by citing in full Sections 11, 12 and 15, to illustrate the necessity of all claims being presented.

If the Indians ever had any valid claim, which we deny, they could not escape this requirement.

Their claim is that under the laws of Mexico they are possessed of an interest, and this claim is met by the opinion of this Court (p. 248) as follows:

"In all this there is no hint or attempt at any

distinction as to the claims to be presented, between those which are perfect and those which are imperfect in their character. On the contrary, the language of the eighth section is as precise and comprehensive as it could well be made, in that it includes every person claiming lands in California, 'by virtue of any right or title derived from the Spanish or Mexican government.'"

We again quote from the same opinion (p. 248):

"The fifteenth section declares that the final decrees rendered in such cases, or any patent issued under the 'act' shall be conclusive between the United States and on the claimants, but it shall not conclude the rights of anybody else, if in a position to contest the action of the board."

Are those Indians in a position to contest the action of the board? Manifestly not. Had they appeared before the Land Commission they would not have based their claim upon the grant to Warner.

Quoting from Chief Justice Taney, this Court proceeds (p. 252):

"It will be seen from the quotations we have made, that the 8th section embraces *not only inchoate or equitable titles*, but *legal titles also*, and required them *all* to undergo examination and to be passed upon by the Court. The object of this provision appears to be, to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy."

If the act "requires them *all* to undergo ex-

amination" how can the defendants pretend that their title was such that it was not necessary to submit it to the tribunal established for the purpose of passing upon it?

In *U. S.* v. *Fossatt*, 21 How. 447; also quoted in the Botiller case, it is said:

"The matter submitted by Congress to the inquiry and determination of the board of commissioners by the act of the 3d of March, 1851, are the claims 'of each and every person in California, by virtue of any right or title derived from the Spanish or Mexican government'."

Commenting upon this expression, Justice Miller says:

"And it will be at once understood that these comprehend all private claims to land in California."

The same learned justice (p. 254) cites with approval the views of the Supreme Court of California in *Teschemacher* v. *Thompson*, 18 Cal., 11, as follows:

"By the act of March 3rd, 1851, the government has afforded the means of protecting all titles, legal or equitable, acquired previous to cession."

Knight v. *U. S. Land Association*, 142 U. S., 161, is an instructive case. On that appeal the judgment of the Supreme Court of California was overturned, and there is much to be found in the opinion there confirmatory of our contention here. Said the Court (p. 188), citing *Beard* v. *Federy*, 3 Wall., 491:

"When informed by the action of its tribunal and officers that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent."

And the concluding words of the opinion (p. 189), contain this significant phraseology:

"No construction which will lead to such results can be given to the fifteenth section (meaning the fifteenth section of the act of 1851, for the purpose of ascertaining and settling private land claims in California.) The term 'third persons' as there used, does not embrace all persons other than the United States and the claimants, but *only those who hold superior titles*, such as will enable them to resist successfully any action of the government in disposing of the property."

In the Maxwell Land Grant case this Court in discussing a confirmation by Congress under the treaty of Guadalupe Hidalgo held, that upon such confirmation by Congress, acting in its sovereign capacity, the validity of the grant is no longer within the judicial power to con-

trovert (121 U. S. 366). Commenting on this the Court say in one of the later cases:

"The action of Congress in confirming it and the subsequent proceedings in the land department, together with the proceedings in the courts to set aside the patent, have certainly settled those questions forever. True, those proceedings do not estop a party claiming the same land under a prior grant from the Mexican government. But, to succeed in his claim, he must recover on the strength of his own title. In other words, he must establish the validity of his own grant in order to defeat a subsequent grant which has been adjudged valid in proper legal proceedings. The confirmation and patenting of the grant in Beaubien and Miranda operated to divest the United States of all their rights to the land embraced in the grant which this country acquired from Mexico by the treaty of Guadalupe Hidalgo. And the only way that the grant can be defeated now is to show that the lands embraced in it had been previously granted by the Mexican government to some other person."

Interstate Land Co. v. *Maxwell Land Grant Co.*, 139 U. S., 569.

This language was afterwards cited with approval by Mr. Justice Brewer, in the case of *Russell* v. *Maxwell Land Grant Co.*, 158 U. S., 253.

Hence, in view of the fact that the Supreme Court has decided in the Botiller case that a person who has not presented his claim to the Board of Land Commissioners has no such title "as will enable him to resist successfully any action

of the government in disposing of the property," does not such non-presentation remove him from the class referred to in the act of 1851 as "third persons?" Not only have defendants no "superior" title, but they have no title at all.

This construction is materially strengthened and made, if possible, more manifest by the opinion of Justice Field in Knight's case, p. 203, where, after showing that a patent is *not merely a quit-claim*, as contended here by the defendants, he says:

"The patent being thus conclusive, can only be resisted by those who hold paramount title to the premises from Mexico antedating the title confirmed, that is, by persons who can successfully resist any action of the United States in disposing of the property or in perfecting the title of the claimant."

This is the construction placed by this learned and experienced Justice upon the fifteenth section of the Act of March 3, 1851, and is also his interpretation of *Beard* v. *Federy*, *supra*.

Hence, it invariably follows that unless the defendants are in such a position that they can stand upon their title and maintain it against the United States, they can claim nothing because of the fifteenth section of the act so often mentioned. While it is important that a patent should be conclusive evidence as against those claiming under the government by title subsequent, it is also plain that a patent should be

sufficiently potential to resist those claiming under the government by an antecedent title not presented to the Board of Land Commissioners. The time has passed for any adjudication upon unpresented land grants.

The cases which we have cited are reviewed and affirmed in the case of *DeGuyer* v. *Banning*, 167 U. S., 723, where the Court held that the survey and the patent were conclusive, against the plaintiff, that land was not included within the grant.

The construction which we give to *Botiller* v. *Dominguez* in reinforced by the opinion of Mr. Justice Field, rendered in *Houston* v. *City and Co. of S. F.*, 47 Fed. Rep., 339:

"The cause of action is the alleged grant of the premises by officers of the former Mexican government to one Fernando Machina and mesne conveyances under him. The alleged grant, if ever one existed, was not presented for examination and confirmation to the Board of Land Commissioners for the settlement of private land claims in California under the act of Congress of March 3, 1851. The land embraced within the alleged grant thus became, by the expressed declaration of Congress in that act, which was passed to carry out our treaty obligations with Mexico, and by the decisions of the Supreme Court of the United States thereon, public land, no longer subject to any private ownership by virtue of the grant. Section 13 of that act declares that all lands, the claims to which have been finally rejected by the Commissioners, as therein provided, 'or which shall be finally decided to be invalid by the District or Supreme

Court, and all lands, the claims to which shall not have been presented to the said Commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States,' 9 St. U. S., 633. In *More* v. *Steinbach*, 127 U. S., 81, 8 Sup. Ct. Rep., 1067, it was held by the Supreme Court of the United States that 'the ascertainment of existing claims was a matter of vital importance to the government in the execution of its policy respecting the public lands, and Congress might well declare that a failure to present a claim should be deemed an abandonment of it and that the lands covered by it should be considered a part of the public domain.' And in *Botiller* v. *Dominguez*, 130 U. S., 255, 9 Sup. Ct. Rep., 525, that Court said: 'We are quite satisfied that upon principle, as we have attempted to show, there can be no doubt of the proposition that no title to land in California dependent upon Spanish or Mexican grants can be of any validity has not been submitted to and confirmed by the board provided for that purpose in the act of 1851, or, if rejected by that board, confirmed by the District or Supreme Court of the United States."

It will thus be observed that Justice Field declared that *Botiller* v. *Dominguez* means precisely that which we have asserted it does mean. The grant upon which the defendants rely does not purport to be a grant under Warner or his successors, and defendants cannot claim any benefit from the confirmation to Warner. Their position is similar to that of the parties referred to by Justice Field, who, he declared, "could in no respect claim any benefit under the confirma-

tion of a pueblo title." This view is absolutely antagonistic to that dictum in *Byrne* v. *Alas*, that, "confirmation relieved the defendants of the necessity of presenting their claims." A party having a valid claim to land under the Mexican dispensation was bound to present the same for adjudication. The decision in *Byrne* v. *Alas* was grounded upon the theory that the Indians were possessed of title adequate to defeat the patent, and were therefore "third parties" within the meaning of the act of Congress of 1851; but when the Federal tribunal determined that no person was exempt from presenting his claim to the Board of Land Commissioners, the foundation of *Byrne* v. *Alas* was withdrawn. Said the Supreme Court of the United States in *More* v. *Steinbach*, 127 U. S., 81: "But independently of this consideration, and assuming that the title under the grant was perfect, the obligation of the grantee was none the less to present his claim to the Board of Land Commissioners for examination."

THE JUDGMENT OF THE LAND COMMISSIONERS AND THE DISTRICT COURT IS CONCLUSIVE THAT THERE WERE NO PERSONS ENTITLED TO SUPERIOR RIGHTS.

The United States having then the title to the premises in controversy, except as against Warner, and the absolute right of disposing of it

excepting as against his grant, proceeded under the Treaty of Guadalupe Hidalgo to determine the status and condition of the land in question and established a tribunal which, under the laws, usages, and custom of the government through which the claim was derived, the principles of equity and the decisions of the Supreme Court of the United States, it determined in favor of Warner, granting him title to the land free and clear of any claim.

Justice Campbell in answering the question, what matters it was the business of the Land Commissioners to determine, says:

"It is obvious that the answer to this question must depend in a great measure upon the state and condition of the evidence. It may present questions of the genuineness and authenticity of the title, and whether the evidence is forged or fraudulent; or, it may involve an inquiry into the authority of the officer to make a grant, or whether he was in the exercise of the faculties of his office when it was made; or it may disclose questions of the capacity of the grantee to take, or whether the claim has been abandoned or is a subsisting title, or has been forfeited for a breach of condition. Questions of each kind here mentioned have been considered by the Court in cases arising under the law. But, in addition to these questions upon the validity of the title, there may arise questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of the claim."

United States v. *Fossatt*, 21 How., 446.

It is, therefore, the affair of the officers of the

United States to investigate all subjects involving the validity of the grant. Continuing, the Court say: "In affirming a claim to land under a Spanish or Mexican grant to be valid within the law of nations, the stipulations of the Treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal, and translative of property. We affirm that the *ownership and possession* of land of definite boundaries rightfully attach to the grantee." (*U. S.* v. *Fossatt*, *ubi supra*.) The opinion in the latter case was cited by Mr. Justice Field with approval in the case of *More* v. *Steinbach*, *supra*, and he observes:

"Trust relations respecting the property between the patentee and others may be enforced equally with such relations between him and others respecting any other property; but until the patent is set aside or modified by proceedings taken at the instance of the government, all the questions necessarily involved in the determination of a claim to land under a Spanish or Mexican grant and in establishing its boundaries, are concluded by it in all courts and proceedings, except as against parties claiming by superior title such as would enable them to resist successfully any action of the government in disposing of the property. The confirmation takes effect, by relation, as of the date of the first proceeding commenced before the Land Commissioners; and an adjudication that at that date it was valid is also an adjudication that it was valid at the date it was made. And the patent which follows the confirmation and approved survey, and is a mat-

ter of record, is itself evidence of the regularity of preliminary proceedings. As was said in *Beard* v. *Federy*, 70 U. S., 3 Wall., 478, 492, 'by it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie.' "

In the language of Mr. Justice Campbell the decisions of the Land Commissioners and of the District Court, in affirming our grant, affirmed "That the possession of the land of definite boundaries rightfully attach to Warner," and as there are no trust relations between the plaintiffs in error and the grantee, and they have no title which they have presented to the land tribunal, they are in no position to contest our right, even if they had pleadings upon which to base such a contest. "The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties." (*Quinby* v. *Conlan*, 104 U. S., 425.)

Said the Supreme Court of the United States *U. S.* v. *Castillero*, 2 Black, 158:

"Power to decide upon the validity of any claim presented to land in California by virtue of any right or title derived from the Spanish or Mexican government as matter of original jurisdiction, is by the act of March 3rd, 1851, exclusively conferred upon the Commissioners appointed under the first section of that act."

In *Newhall* v. *Sanger*, 92 U. S., 761, it was said, in speaking of the statute of 1851, that claims, whether grounded upon inchoate or perfected title, were to be ascertained and adequately protected.

It must be remembered that Warner's petition recites that the land is vacant. (Tr., fol. 39.)

In issuing the patent, therefore, it was adjudged that the land was vacant. To controvert this finding is to assail a patent in a collateral proceeding, which cannot be done.

A later expression of this Court upon this subject is to be found in *United States* v. *California, etc., Land Co.*, 148 U. S., 43, citing *United States* v. *Arredondo*:

"The only question which can arise between an individual claiming a right under the acts done and the public, or any persons denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officers, whether executive (1 Cranch, 170, 171), legislative (4 Wheat., 423; 2 Pet., 412; 4 Pet., 563), judicial (11 Mass., 227; 11 S. & R., 429; adopted in 2 Pet., 167, 168), or special (20

Johns, 739, 740; 2 Dow., P. C., 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal is prescribed by law. See also the following cases: *Foley* v. *Harrison*, 15 How., 433, 448; *Johnson* v. *Towsles*, 13 Wall., 72, 83; *Smelting Company* v. *Kemp*, 104 U. S., 636; 640; *Spelpley* v. *Cowan*, 91 U. S., 330, 340; *Moore* v. *Robbins*, 96 U. S., 530, 535; *Quinby* v. *Conlan*, 104 U. S., 420, 426; *Steel* v. *Smelting Co.*, 106 U. S., 447, 450; *Lee* v. *Johnson*, 116 U. S., 48, 51; *Wright* v. *Roseberry*, 121 U. S., 488, 509."

This doctrine has been applied to land titles in New Mexico, confirmed by Congress, where confirmed by an act of Congress, and the same principle is enunciated by the Court.

"By article 8 of the treaty of Gaudalupe Hidalgo, and article 5 of the Gadsden treaty, the property of Mexicans, within the territory ceded by Mexico to the United States, was to be 'inviolably respected', and they and their heirs and grantees were 'to enjoy with respect to its guaranties equally ample, as if the same belonged to citizens of the United States.' 9 Stat. at L., 929, 930; 10 Stat. at L., 1035.

"Undoubtedly private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. But the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the government; Congress might either itself discharge that duty or

delegate it to the judicial department. *De la Croix* v. *Chamberlain*, 25 U. S., 12 Wheat., 599, 601, 602; *Chouteau* v. *Eckhart*, 43 U. S., 2 How., 344, 374; *Tameling* v. *United States Freehold & E. Co.*, 93 U. S., 644, 661; *Botiller* v. *Dominguez*, 130 U. S., 238.

"For the adjustment and confirmation of claims under grants from the Mexican government of land in New Mexico and in Arizona, which was formerly a part of it, Congress had not, when this case was decided below, established a judicial tribunal as it had done in California, and as it has since done in New Mexico and Arizona, by the Act of March 3, 1891, Chap. 539 (26 Stat. at L. 854.)

"But Congress reserved to itself the determination of such claims; and enacted that the surveyor-general for the territory, under the instructions of the Secretary of the Interior, should ascertain the origin, nature, character and extent of all such claims; and for this purpose might issue notices, summon witnesses, administer oaths and do all other necessary acts; and should make a full report on such claims, with his decision as to the validity or invalidity of each under the laws, usages and customs of the country before its cession to the United States; and that his report should be laid before Congress for such action thereon as might be deemed just and proper, with a view to confirm *bona fide* grants, and to give full effect to the treaty of 1848 between the United States and Mexico. Acts of July 22, 1854, Chap. 103, Sec. 8 (10 Stat. at L., 304); July 15th, 1870, Chap. 292 (16 Stat. at L., 300).

"In *Tameling* v. *United States Freehold & E. Co.* above cited, it was therefore held that the action of Congress, confirming, as recommended by the surveyor-general for the territory, a private land claim in New Mexico, was conclusive of the evi-

dence of the claimant's title, and not subject to judicial review; and Mr. Justice Davis, in delivering the opinion of the Court, said: 'No jurisdiction over such claims in New Mexico was conferred upon the Courts; but the surveyor-general, in the exercise of the authority with which he was invested, decides them in the first instance. The final action on each claim, reserved to Congress, is, of course, conclusive, and therefore not subject to review in this or any other forum. It is obviously not the duty of this Court to sit in judgment upon either the recital of matters of fact by the surveyor-general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action.' 93 U. S., 662. See also *United States* v. *Maxwell Land Grant Co.*, 121 U. S., 325, 366; 122 U. S., 365, 371.

"The action of Congress, when taken, being conclusive upon the merits of the claim, it necessarily follows that the judiciary cannot act upon the matter while it is pending before Congress; for if Congress should decide the same way as the Court, the judgment of the Court would be nugatory; and if Congress should decide the other way, its decision would control."

Astiazaran v. *Santa Rita Land & Mining Co.*, 148 U. S., 80.

The same conclusion was reached by this Court in a case where the title to an Indian pueblo had been confirmed by an act of Congress, citing the Tameling and Maxwell Land Grant cases, and again where a mining grant had been similarly confirmed and patent issued.

United States v. *Conway*, 175 U. S., 60;
Real De Delores del Oro v. *United States*, 175 U. S., 71.

Apparently this Court found difficulty in coming to the conclusion that even a complete and perfect grant of land in New Mexico could be asserted as against an adverse private claimant in the courts of justice without being confirmed, holding that the Act of 1891 is permissive and does not compel the submission of claims for confirmation. But, says Mr. Justice Gray, "A grant of land in New Mexico, which was complete and perfect before the cession of New Mexico to the United States, is in the same position as was a like grant in Louisiana or in Florida, and is not in the position of one under the peculiar acts of Congress in relation to California, and may be asserted, as against any adverse private claimant, in the ordinary courts of justice."

Ainsa v. *New Mexico & A. R. Co.*, 175 U. S., 76, 90.

The same opinion, quoting Mr. Justice Trimble in a leading case, speaking of the obligations of the United States under the Gadsden Treaty, says: "'While the government has admitted its obligation to confirm such inchoate rights or concessions as has been fairly made, it has maintained that the legal title remained in the United States until, by some act of confirmation, it was passed or relinquished to the claimants. It has maintained its right to prescribe the forms and manner of proceeding in order to obtain a confirmation, and its right to

establish tribunals to investigate and pronounce upon their fairness and validity.' *De la Croix* v. *Chamberlain* (1827), 12 Wheat., 599, 601, 6 L. ed. 741, 742. Even grants which were complete and perfect at the time of the cession may be required by Congress to have their genuineness and their extent established by proceedings in a particular manner before they can be held to be valid." (175 U. S., 79.)

The learned Justice after reviewing the provisions of the Treaty of Guadalupe Hidalgo and the Act of March 3rd, 1851, concludes: "This court held that this provision included perfect as well as inchoate titles, and that consequently no suit could be maintained in a court of the state of California *on any Spanish title whatsoever*, if it had not been presented to the commissioners in accordance with the act of Congress. *Botiller* v. *Dominguez*, (1889). 130, U. S., 238." (175 U. S., 84.)

Nor is the length of possession any evidence of title.

Chavez v. *United States*, 175 U. S., 509.

The De Haro case, which we have cited under another head, is also cited in a recent case involving the question of title from evidence of possession and holding that the character of such possession must be inconsistent with merely permissive occupation. Citing *Serrano* v. *United States*, 5 Wall. 461, Mr. Justice Peckham

says: "While under the Civil law, including Spanish law, one might prescribe beyond his title he cannot do so contrary to the title."

Peabody v. *United States*, 175 U. S., 546, 551.

In another recent case Mr. Justice White discusses the rules and regulations of November 28th, 1828, and illustrates from a *resume* of the decided cases the care which the Mexican government exercised in making grants of land and preserving the record of the same with the conditions of their grant, and concludes a review of the decisions under the California act with a statement that "it was necessary that a grant should be evidenced by an act of the government clearly and unqualifiedly conveying the land intended to be granted, and a public record in some form was required to be made of such grant."

United States v. *Elder*, 177 U. S., 119.

These cases show that this Court has no jurisdiction to entertain any claim made by plaintiffs in error in view of the decision of the Land Commissioners confirming the grant without reservation, since it was necessary that their rights should pass through the sieve of the land commission before they could be made the subject of adjudication by the ordinary courts of justice.

An examination of the Act of March 3, 1851, strengthens this conclusion. It was an act not only to ascertain but to "settle" private land claims in the State of California, and the title and character of it and the act supplemental thereto show that it was the intention of Congress to effectually settle and clear from any cloud the titles which were granted. Moreover, provision is made in section 4 for the appointment of an agent, learned in the law and skilled in the Spanish language, to superintend the interests of the United States in the premises, to whom notice of all depositions must be given, or to the district attorney of the district, and by section 9 the district attorney of the United States is to appear; and that the Indians were not forgotten is shown by section 16, by which it is made the duty of the Commissioners to report what lands are occupied and cultivated by pueblos or rancheros Indians. If then, the United States has an interest now in protecting the rights of the plaintiffs in error, certainly it was more their duty to preserve those rights before the Land Commission, and the United States having been represented before the board the adjudication of the Court is conclusive that there were no rights reserved to the Indians.

THE SURVEY IS CONCLUSIVE AGAINST ANY COLLATERAL ATTACK.

Not only did the plaintiffs in error have the

opportunity to present their claims before the Mexican government and the Land Commission and to resist the confirmation of the grant without the reservation of their rights, if any such existed, but if these are not conclusive upon them they still could have objected to the survey, for it was the duty under the act of July 1st, 1864, to give public notice of the survey and plat, and objections could have been made within ninety days "by any party claiming to have an interest in the tract embraced by the survey," and the Commissioner of the General Land Office could require, if the ends of justice would be subserved, a further report and proofs to be taken, or he could direct a new survey. The survey in question showed no trace of any Indian rights either upon the plat or in the field notes, and clearly included all the land in question. As there is no evidence that it had been surveyed under the Mexican government and juridical possession given, this was a duty which the United States government had assumed, and was, by virtue of the survey, carrying out; and the approval of the survey and the legal right to exclusive possession which followed under it excluded any possibility of the reservation of any rights in the plaintiffs in error. If the previous proceedings were not notice to them and did not extinguish their rights, this was their day in court, and this worked an extinguishment of such rights.

Therefore, it was the affair of the officers of the United States to investigate all subjects involving the validity of the grant.

"It follows from what is thus said that it would be a sufficient answer to the contention of the defendants that the grant under which they claim to have acquired a perfect title conferred none. The grantees were not invested with such title, and could not be without an official delivery of possession under the Mexican government; and such delivery was not had and could not be had after the cession of the country, except by American authorities acting under a law of Congress." (*More* v. *Steinbach*, *supra*.)

The case of *Stoneroad* v. *Stoneroad*, 158 U. S., 240, establishes the proposition that even without notice all parties are bound, even if some were minors and some were under coverture, and the same case holds, citing *Knight* v. *United Land Association*, 142 U. S., 161, that the power of segregating and surveying public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding.

In another case in the same volume the courts cite with approval *Cregin* v. *Powell*, 128 U. S., 691; *Beard* v. *Federy*, 3 Wall., 492; and *More* v. *Steinbach*, 127 U. S., 83, as to the conclusiveness of the patent, and say:

"These authorities are decisive upon this question. And in the nature of things a survey

made by the government must be held conclusive against any collateral attack in controversies between individuals. There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys, and no other tribunal is so competent to deal with the matter as the land department. None other is named in the statues. If in every controversy between neighbors the accuracy of a survey made by the government was open to question interminable confusion would ensue."

Russell v. *Maxwell Land Grant Co.*, 158 U. S., 253, 258.

THE ACTION OF THE GOVERNMENT OF THE UNITED STATES RESULTING IN THE ISSUANCE OF A PATENT IS CONCLUSIVE THAT THERE WERE NO PERSONS ENTITLED TO SUPERIOR RIGHTS.

This is the ground upon which the case was decided in the California courts, and, as we have said, we can add little to the exhaustive opinion of Mr. Justice Van Dyke, printed in the transcript, in which the Court holds that there is no privity between the plaintiffs in error and the grantee, or anything from which a trust could arise in their favor; that they are not third persons, are mere strangers to the record, and that the patent is conclusive of the case against them.

Said Justice Field, speaking for the Court in *Smelting Co.* v. *Kemp*, 104 U. S., 640:

"The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be

lawfully performed only after certain steps have been taken, that instrument duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

In *Knight* v. *U. S. Land Association*, *supra*, the same Justice said:

"The attempt is futile to use these cases (*Doolan* v. *Carr* and similar decisions) or in any other case to establish the proposition that if an error can be shown in the action of an officer of the Land Department in a matter subject to its jurisdiction, the proceeding of the officer may be treated as a nullity and the patent issued thereon may be collaterally assailed. This view is untenable and does not merit serious consideration."

As Warner's petition recited that the land was vacant and the patent was issued for the land, to controvert this allegation is to assail the patent in a collateral proceeding.

If the plaintiffs in error had presented their claim and a patent had issued to them a case might arise for the adjudication of this Court as to the priority right; but, as we have said, the Supreme Court of the United States has never recognized the right of a party claiming under Mexican or Spanish laws, who has not presented his claim to the board of Land Commissioners to

attack a patent, issued upon a decree based upon an independent and hostile grant.

Adams v. *Norris*, 103 U. S., 593; *Beard* v. *Federy*, 3 Wall., 478; *Henshaw* v. *Bissel*, 18 Wall., 225; *Miller* v. *Dale*, 92 U. S., 473; *Townsend* v. *Greely*, 5 Wall., 335; present instances where the dispute arose between those holding conflicting patents, or between the holder of a patent and a party claiming that because of previous trust relations the legal title was held for his benefit.

In *Henshaw* v. *Bissell*, 18 Wall., 255, it is said:

"Whenever two surveys covering the same tract are approved by the political department, and a legal controversy arises respecting the land between the claimants under the different surveys, the question which of the two surveys appropriates the premises in dispute is necessarily transferred to the judiciary. The fact that two surveys embrace the same land is itself proof that either one of the original concessions was improvidently issued and to the extent of its interference with the other was inoperative, or that error has intervened in one of the surveys."

The Court then proceeds to more fully draw the distinction between a case where one party claims under a patent and the other in hostility to such grant:

"But in this case both parties stand upon patents; both have in these instruments the conveyance of the government."

On page 265, same opinion, it is said, com-

menting upon certain cases cited in plaintiff's brief:

"The patent, treated merely as the deed of the government, is held in these cases to have the operation of a quit-claim, or rather, of a conveyance of such interest as the United States possessed in the land, and to take effect by relation at the time when proceedings were instituted before the board of Land Commissioners. The patent is also held in those cases to be record evidence of the action of the government upon the claim of the patentee under the Mexican grant, establishing without other proof the validity of the claim and its rightful location."

And in *Harrison* v. *Ulrich*, 39 Fed. Rep., 655, it is said:

"The patents were not issued until those concessions had been recognized by the tribunals of the United States as genuine, and as conferring a right or equity upon the respective claimants, which was entitled to protection under the act of March 3, 1851. It was not the purpose of that act, or of the proceedings under it, to supersede rights or equities relating to lands conferred by the former government, but to confirm and protect them by giving the holder such a record or documentary evidence of their validity as would enable him to enforce them in the Courts of the country."

From this it obviously results that if those who had rights and equities as against the former government declined to have the same adjudicated by the Land Commission, they ceased to have any claim, whether the premises were or were not patented to another.

The learned judge who wrote the opinion in the Supreme Court of California, quoting the language of Mr. Justice Field in *Houston* v. *San Francisco*, cited by us and the decision in *More* v. *Steinbach*, *ubi supra*, holding the doctrine that the laws of a ceded country remain in force after the cession, is not applicable to laws concerning the alienation of any portion of the public domain, says:

"In this case, therefore, if any rights whatever can be conceded to the appellants, under the former Mexican government, such rights were in the nature of private property, or a right dependent upon the will and pleasure of the state or nation. If, as claimed, it were a right to possess, occupy and use land, that amounted to a title to property. It being a title or right to property, whether in fee simple or possessory merely, derived from the Mexican government, under the act of Congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation. If, on the other hand, it were a mere license at the pleasure of the former government to occupy the land, such right would not prevent that government from granting the land unincumbered with such right. This was the case in reference to pueblos under the former regime. The pueblos held title in trust for the use of the inhabitants, not conferred by special grant, but under the laws and regulations of Spain and Mexico, and there were many cases where such governments made specific grants within the territorial limits of the pueblos which were, after the change of government, confirmed and patented by the United States, under the act of Congress of 1851. The United States succeeding to all the rights and sovereignty of

Mexico, had such power to grant all public lands —that is, all lands not claimed by private parties, and not presented for confirmation, the claims were waived or forfeited, and such lands thereafter became public lands."

Harvey v. *Barker*, 126 Cal., 274.

Said Mr. Justice Field in a case involving the title to Mission lands: "The patent is something more than a mere conveyance of the government. It is evidence, having a force and operation of the record that the title claimed was valid, or at least entitled to recognition and confirmation at the time the sovereignty of Mexico over the country was superseded by the United States."

Foster v. *Mora*, 3 Sawyer, 46.

Mr. Justice Miller in affirming the case of *Foster Mora* in this Court, says: "It is also contemplated as the final evidence of title that a patent should issue to the claimant or his representatives when the claim was established in whole or in part."

Foster v. *Mora*, 98 U. S., 425.

In another case Justice Field, in discussing the obligation of the government under the treaty, which he declares to be political in character, and the necessity of presenting all claims, says: "Final confirmation as defined by the act is deemed to be the patent from the United States."

Montgomery v. *Bevans*, 1 Sawyer, 653.

It is said that the plaintiffs in error are third

parties within the meaning of that act, and we will consider this under a separate head.

THE TRUE CONSTRUCTION OF THE ACT OF MARCH 3, 1851, AS TO THIRD PARTIES.

We claim that the 15th section of the act in question, reserving the rights of third parties refers to those only who have placed themselves in a position to justify the assertion of a claim against the government of the United States; and that, although the defendants might have had a valid claim under the law of Mexico (a proposition which the facts do not sustain), nevertheless their claim not having been recognized by the Board of Land Commissioners, and nothing appearing to show that any trust relation exists which would justify acquiring the legal title from the defendants, there is no merit in the contention that the defendants are third parties within the meaning of the said act; but, on the contrary, they are mere strangers to the record. In the Knight case (142 U. S., 203) it is said: "The patent being thus conclusive can only be resisted by those who hold a paramount title to the premises from Mexico antedating the title confirmed." But, as we have seen, there cannot be any paramount title from the Mexican government except such title as is evidenced by the decree of the Board of Land Commissioners and subsequent proceedings under the act of March 3, 1851.

In *Harrison* v. *Ulrich*, 39 Fed. Rep., 654, Mr. Justice Field said:

"However conclusive against the United States and parties claiming under them by title subsequent a patent may be, it in no respect impairs the right of the previous patentee to contest the right upon which the subsequent patent has been issued for the same premises. Every patent issued upon a preferred claim under the act of March 3, 1851, in terms declares that it shall not affect the rights of third parties; that is, those who have a standing to contest the pretentions of the patentee had no patent been issued."

If no patent had been issued to Warner could the Indians, whose pretentions are the subject of this litigation, maintain a claim in the face of the fact that they have never appeared before the Board of Land Commissioners? This interrogatory is answered by the decision in *Botiller* v. *Dominguez*, and the subsequent cases in this Court and in California following it, culminating with *Los Angeles F. & M. Co.* v. *Thompson*, 117 Cal., 594, and the case at bar.

Counsel appear to think that because Warner obtained a patent for the disputed premises that therefore the Indians were absolved from applying for the same, and that they are not and cannot be compelled to take any steps to perfect their claims. But if the Indians are third persons it must be because they hold by superior title. The ground of their contention is a supposed right derived from Mexico, but such title

avails nothing unless it has been approved. There can be no "superior title" which has not passed the scrutiny of the board. If the plaintiffs in error had a perfect title under the laws of Mexico, and had neglected to present that perfect title, they would have no right now to assert the same. Their position cannot be improved merely because Warner, acting for himself and in hostility to the Indians, procured a patent to be issued.

Ohm v. *San Francisco*, 92 Cal., 437, 454.

De La Guerra v. *Santa Barbara*, 117 Cal., 528, 532.

" We start with the title of petitioner at that date (presentation of the petition for confirmation) and titles subsequently derived from him in any legal mode, are valid, no matter to whom the patent is subsequently issued."

McDonald v. *McCoy*, 121 Cal., 55, 67.

But it does not inure to one where title is not so derived, or in whose favor no trust is created by the recitals in the patent. (*McDonald* v. *McCoy*, *ubi supra*).

The title thus confirmed and patented to him did not inure to any person claiming under any rights other than a grant from him.

City of Los Angeles v. *Pomeroy*, 125 Cal., 426.

If plaintiffs in error had presented themselves before the Land Commission and had procured an approval of their claim, and such approval had ripened into a patent, it would then be competent and proper for the Court to pass upon the respective petitions of the patentees. If Warner occupied a position in any way fiduciary and a proper pleading was before this Court with reference to the same, then the Indians might have the benefit of Warner's grant. But they do not claim under that grant, nor are there any pleadings in this action, or any evidence upon which such a claim could be be based. (*City of Los Angeles* v. *Pomeroy*, *ubi supra*.) It is asserted, however, that there is a trust existing in favor of the Indians and arising by operation of law, because it is claimed Mexico in disposing of her domain, reserved Indian rights, but, as we have shown, no reservation of this kind was made under the treaty, and even if such a reservation was made no trust of any kind would arise as to Warner. It would be a trust imposed upon the national faith and to be executed under the laws of the government, and, as we have shown, in the execution of these laws no reservation of any kind was made. Under the laws of Mexico, as the plaintiffs in error claim, vacant lands alone could be granted.

Even if the Warner Ranch at the time of the Mexican cession was occupied not only by In-

dians, but by many other *bona fide* settlers; yet if the Mexican government and subsequently Federal officials decided that the land was vacant, and therefore was not so occupied, nevertheless, no one can now be allowed to make proof in contravention of the patent. The making of the grant by Mexico, its ratification by the Board of Land Commissioners and the District Court, the survey and the subsequent patent by the United States finally determine that there was no adverse occupancy, and the assumption of such occupancy is inconsistent with the validity of the grant; no trust relation arises merely because there were Indians in possession.

While the Indian may be considered a very valuable member of the community, he is not now, nor has he ever been treated as superior to the governing class. We summarily eject Mexicans and Americans who claim in defiance of a patent, although they may really have been prior occupants.

"Their interest was, at best, only such an equity as arises in favor of parties who had long been in the occupation of public land, with the silent acquiescence of the government, from the possible improvement they may have made upon it. To such parties the government may well extend a preference in the purchase or donation of the lands when it concluded to dispose of them. But mere possession of any portion of the public domain, under an instrument which did not purport to transfer the property, did not create, under the Spanish law, a title in the pos-

sessor which would enable him to hold the property against the crown; nor did such possession, however long continued, create any title against the Mexican government." *Nieto* v. *Carpenter*, 21 Cal., 455, 489.

Harrison v. *Ulrichs, ubi supra.*

No one, however, thinks of asserting a trust as to Mexicans or Americans. The pretention that whenever property is acquired in violation of law a trust arises in favor of the man who ought to be the possessor is, to say the least, novel. And this is more peculiarly true of the Indians, as to whose lands Congress has the exclusive right of pre-emption. And so it was held by the Supreme Court of California, in a case where a patent had been issued to public lands which had been occupied by Indians long before the Treaty of Guadalupe Hidalgo, that the execution of the trust imposed by the treaty was a political power, carried out through the commission, and as the Indian rights were not presented the patent was conclusive evidence of title. This case is a conclusive adjudication that the plaintiffs in error are not third persons within the meaning of the act.

Thompson v. *Doaksum*, 68 Cal., 593.

There is nothing in the pleadings or in the evidence to warrant the annullment of the grant under which we claim. It is hardly necessary to cite cases upon this branch of the subject.

U. S. v. *Throckmorton*, 98 U. S., 61;

U. S. v. *San Jacinto Tin Co.*, 125 Id., 273;
Los Angeles F. & M. Co. v. *Hoff*, 48 Fed. Rep., 340;
Houston v. *San Francisco*, 47 Fed. Rep., 337.

It is true that one purpose of the act of 1851 was to separate and distinguish the lands which the United States owned as property, and which were properly subject to sale as public lands, and from those which belonged either equitably or legally to private parties under titles derived from Spain or Mexico.

There is no dispute as to this, but according to the contention of defendants a Mexican grant which was not presented at all may be valid if confirmation was made to another upon a conflicting grant. The diligence of plaintiff, it would seem, excuses the laches of the defendants.

In *Adam* v. *Norris*, 103 U. S., 593, where the parties each claimed under a patent, Justice Miller said that such an instrument was in the nature of a quit claim; but this view is modified by *Botiller* v. *Dominguez*, and its inaccuracy is pointed out by Justice Field in the quotation already made from the Knight case (142 U. S. 203). We are unable to discover anything in *Townsend* v. *Greely*, 5 Wall., 326, which justifies the argument that upon the issuance of the patent to Warner a trust attached in favor of the Indians. In the Townsend case, defendant claimed under a title derived from a municipal ordinance of the

City of San Francisco, and that municipality asserted title as the successor of a Mexican pueblo. This claim had been approved by the Board of Land Commissioners, and the Court correctly held that the claim was subject to a trust before the presentation to the board, and that the trust was not discharged by the confirmation and the subsequent patent. The pueblo could not take under any circumstances except in trust for its inhabitants; moreover, Justice Field took occasion to note that the decree declared, "That the confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town or city of San Francisco or other competent authority, and as to any residue in trust for the use and benefit of the inhabitants of the property."

In the case at bar the decree contained no reservation; and what is more, there was no disability on the part of Warner to take title in fee. There was no grant in trust to him, and as far as the laws of Mexico were concerned, he was entirely competent to become a grantee in fee simple absolute. Indeed, not only the patent, but also the grant upon which plaintiffs rely, itself gave him the right to the *exclusive* occupancy (Tr. fol., 45), and the finding of the prefect was that the land was vacant (Tr., fol. 41).

Another case relied on by plaintiffs in error upon this point is *Meader* v. *Norton*, 11 Wall.,

442. This decision was rendered in 1871, and when read in connection with *More* v. *Steinbach*, and *Botiller* v. *Dominguez*, tends to support respondent's position. The parties who prevailed in that litigation did not make any such contest as do the Indians here, but they claimed under the only grant before the Court and which matured into a patent, but asserted that the benefits of that patent should come to them. They did not dispute the potentiality of the patent, but sought by proper equitable averments to obtain the title which was held by another; and the grounds upon which the interposition of the Chancellor were invoked were clearly averred. We quote from the decision:

"Argument is not necessary to show that a patent in a suit at law is conclusive evidence of title against the United States and all others claiming under the United States by junior title. Until the patent issues the fee is in the government, but when it issues the legal title passes to the patentee. Persons claiming to hold the land against the patent cannot have relief in a suit at law, but courts of equity have full jurisdiction to relieve against fraud or mistake, and that power plainly extends to cases where one man has procured the patent which belonged to another at the time the patent was issued."

Bagnell v. *Broderick*, 13 Peters, 436;

Patterson v. *Wrenn*, 11 Wheat. 380.

"Where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee

of the true owner and compel him to convey the legal title."

Stark v. *Starr*, 6 Wall., 419.

Commenting on the cases of *Stark* v. *Starr* and *Meader* v. *Norton*, this Court says:

"The substance of these authorities is, that wherever a person obtains a legal title to land by any artifice or concealment, or by making use of facilities intended for the benefit of another, a court of equity will impress upon the land so held by him a trust in favor of the party who is justly entitled to them, and will order the trust executed by decreeing their conveyance to the party in whose favor the trust was created."

Felix v. *Patrick*, 145 U. S., 317, 328.

Bernier v. *Bernier*, 147 U. S., 242.

And, commenting upon the former case, the California Court, says:

"To entitle the alleged owner, however, to such equitable relief, he must show that he occupies such a status as entitles him to control the legal title; that the officers who awarded the land to another, to whom the title was issued pursuant to the judgment, were imposed upon and deceived by the fraudulent practices of him in whose favor the judgment was given; and that they were thereby induced to give judgment in his favor. These things must be distinctly alleged and clearly proven."

Plummer v. *Brown*, 70 Cal., 546.

In other words, in order that the plaintiffs in error can come in under our patent, they must be entitled to control the legal title; there must be artifice or concealment, and they must seek by

appropriate allegations and proofs the conveyance of the title to themselves.

Counsel rely quite confidently upon *Adams* v. *Norris*, *ubi supra*; also *Lease* v. *Clark*, 20 Cal., 425, and *Teschemacher* v. *Thompson*, 18 Cal., 11. These cases merely hold that third parties are those whose title accrued before the duty of this government and its rights under the treaty attached. But such persons in order to maintain their claim were bound to comply with the law regarding the presentation thereof. If it was important to compel the presentation of any claim, no reason can be assigned for making an exception as to Indians. The object was not alone to segregate patented lands from the public domain, but also to "settle" all claims to Mexican title. If A and B hold conflicting titles, and A presents his claim and procures its confirmation, B can not better his condition by the diligence of A, and entirely neglect for all time to prove up. No privity or trust relation existing between the parties, neither could expect to derive any benefit from the enterprise of the other. The earlier decisions read in connection of those of a later day make the solution of this subject free from difficulty. Nor is *U. S.* v. *Morillo*, 1 Wall., 706, in conflict with this view. It was there represented that the lower court had decided in favor of the validity of both patents, and the Supreme Court, assuming this to be the case, pointed out

that there was nothing to show which decree was first made or which claim was first presented, and that therefore great injustice would be done in reversing the judgment, and leaving another claim for the same land to stand affirmed in favor of another person. When this decision was rendered the Court's attention had not been called to the necessity of presenting all claims; nor had the doctrine of *Botiller* v. *Dominguez* become settled or even generally understood.

Doolan v. *Carr*, 125 U. S., 618, is one of the cases upon which counsel relies, but the decision is of no materiality as to the point involved here. It is true that it is decided that a patent is void if issued by officers acting without authority, and the Court well says that the distinction is manifest, although the circumstances that enter into it are not always easily defined. The case presented no such issue as that here involved. Moreover, *Doolan* v. *Carr*, and other similar cases, have been so often misunderstood that Justice Field has taken occasion to more accurately define their significance. (*Knight* v. *U. L. Association*, 142 U. S., 214. See also *Borden* v. *N. P. R. R. Co.*, 154 U. S., 288).

THE TRUE CONSTRUCTION OF THE SIXTEENTH SECTION OF THE ACT OF 1851 REQUIRING THE COMMISSIONERS TO REPORT THE TENURE BY WHICH MISSION LANDS ARE HELD.

Plaintiffs in error assume that Congress did

not intend that the rights of the Indians should be cut off by failure on their part to present their claims. The reference to section sixteen, and the argument in support of appellant's theory is strongly affirmatory of the contrary conclusion. If the Indians are third parties, and if their rights are guarded by section fifteen, can any reason be assigned for the action of Congress in defining the duties of the Commissioners with reference to Mission lands? Obviously the effect of section sixteen must be that Mission lands and Indians, such as the defendants herein, are not protected by section fifteen, and are not "third parties." This being the case, the act of 1851 made it the duty of the Commission to report the status of the Mission Indians to Congress so that that body might be able to provide for their future government and to treat them equitably and in accordance with the general policy of the United States. If the Indians are to be regarded as "third persons," and if their rights were to be conserved under the fifteenth section, *supra*, the sixteenth would be unnecessary. Reading the Treaty of Guadalupe Hidalgo and the Queretaro Protocol the meaning of the Act of 1851 becomes plain. *Mexicans* who held grants within California were provided for. Indians were required to depend upon the generosity of the United States, and the Federal government made it the duty of the Land Com-

mission to give the facts to Congress so that appropriate legislation might be enacted. Undoubtedly the facts were all communicated to the legislative department, and the California Indians were considered in view of the whole situation. When judgment is entered here in favor of the plaintiff, the defendants, if they are entitled to the protection of the government in any respect, will receive that protection; but they have no right to invoke a treaty which does not mention them.

THE STATUS OF THE PLAINTIFFS IN ERROR AS INDIANS DOES NOT RELIEVE THEM FROM THE BINDING EFFECT OF THESE PROCEEDINGS.

The position taken by Mr. Justice McFarland in his dissenting opinion in the California Court seems to us untenable. We have already shown that the legal title to lands such as these did not pass subject to the rights of occupation of the Indians; that such was not the law nor the custom under the Mexican and Spanish rule in California, and we state to this Court with the utmost confidence that there is nothing either in the law or in custom in making California grants to justify such a claim.

In the great mass of authorities cited by Bancroft there is but one instance in which the Spanish or Mexican authorities suggested that

the Indians be left in their rancherias, and that the effort to Christianize and civilize them be made there; and in that instance the contention was abandoned in deference to the arguments of the missionaries. (Bancroft, Vol. VIX, p. 6.) The entire missionary system was destructive of the aboriginal life in rancherias. (Vol. XIX, p. 90, 414.) In place there was substituted a mild but yet absolute serfdom under the missionary rule and at the Missions where the Indians could be controlled.

Blackmar in the interesting work already cited has given a clear and comprehensive account of the system (Spanish Institutions in the Southwest, p. 112). After the secularization of the Missions the condition of the Indians was but little changed; a secular was substituted for a priestly master—they were still dependent, without independent rights.

It is true that the Mexican constitution made no distinction of race, and that the Indian was under the law equally a citizen with the white man. But if this horn of the dilemma is taken it does not benefit the plaintiffs in error.

If it is claimed that they were a class whose rights were preserved even against the express language of a grant, then there is no scintilla of evidence in any of the authorities, including the enormous mass which Bancroft has collected, and that which has been before this Court in the nu-

merous Mexican grant cases to justify such a claim; and in view of the fact that Indians were upon nearly every grant in California at the time the grants were made, and no such contention was ever made excepting in the case of *Byrne* v. *Alas*, where an express reservation in their favor was made in the grant, the contention is without merit.

On the other hand, if they claim that they were "Mexicans" and their rights preserved by the treaty, then it is too clear to need argument to show that they should have presented their claims as other Mexicans, before the duly constituted tribunal.

It is fruitless to enter into the interesting question of the peculiar status of the Indian within the United States and how it arose. We fear it would bring us into the arena of a much broader and deeper political question than arises here; this Court has held that the powers of local self-government enjoyed by the Indian within the limits of the original thirteen states existed prior to the Constitution and therefore is not controlled by the powers conferred by the Constitution on the national government. (*Talton* v. *Mayes*, 163 U. S., 376.) But the Indians in this case had no such powers of local self-government at the time of annexation. There is nothing in their status before annexation to give them any rights or to relieve them from any duty im-

posed upon other persons within the territory annexed, nor is there anything in their present status, for they are not Indians living upon a reservation.

On the other hand if they are pueblo Indians they held whatever title they ever held in fee by grant made by the government of Spain, "recognized by the Mexican government and protected by it in the treaty of Guadalupe Hidalgo" (*U. S.* v. *Joseph*, 94 U. S., 614), which therefore must be submitted to the commission.

Moreover, Indians are chargeable with *laches* if they fail to protect their interests in a suit at law (*Felix* v. *Patrick*, 145 U. S., 317).

Plaintiffs in error in their petition for rehearing in the California Court cited *Choteau* v. *Molony*, 16 How., 203, and *Cherokee Nation* v. *State of Georgia*, 5 Pet., 1, in support of *Byrne* v. *Alas*. The former of these cases, which has never been subsequently cited save by a District Judge *arguendo* (*Muse* v. *Arlington Hotel Co.*, 68 Fed., 642), merely holds that the terms of the grant show that a mining right and not the fee and possession of the soil was intended to be granted. The Court's discussion as to the power of a Spanish Governor to grant subject to the Indians' right of occupation is not necessary to the case. In the case at bar the grant shows that the exclusive right of possession was granted, and the finding of the prefect was that

the land was vacant, both of which are inconsistent with the theory that the grant was made subject to the rights of possession in the Indians. In the latter case, where the Cherokee Nation sought to enjoin the State of Georgia from enforcing its laws within the Cherokee territory, Chief Justice Marshall in delivering the opinion of the Court discusses the question whether the Cherokees constitute a foreign state within the sense of the constitution, and holds that they do not. He incidentally refers to the right of the Indians to occupy, but declares "they occupy territory to which we assert a title independent of their will." Georgia in this case held in fee, the Indians were in occupation and the United States had the sole power to deal with the Indians and to terminate that occupation. These cases have no relation to the case at bar; they deal with different conditions and not with a case where the Mexican government held the fee and the power to terminate the occupation by the Indians irrespective of the differences which we have pointed out in the character and treatment of the Indians in California.

The action of the United States government upon this matter is significant. In 1875 the Agua Caliente lands were declared a reservation. This was before the making of the final survey by Minto. When that survey had been made, taking in the land within the reservation, show-

ing upon it no evidence of any Indian rights either in the field notes or the plat, the very next day after its approval and the isssuance of the patent, namely, January 17th, 1880, by executive order the reservation was revoked. Here is an express declaration on the part of the United States government, the guardian of these wards, that no further claim of Indian rights was made since the matter had been finally adjudicated by the issuance of the patent.

In this suit, however, the same guardian having originally deeded the property, declaring that it was vacant and that we had the right to its exclusive possession; having, in a formal trial, in which the guardian took part and was represented by counsel, the facts now before the Court being before the tribunal, submitted to an adjudication that that grant was valid and binding; having caused a survey to be made and a patent to be issued free and clear of all claims; having the next day voluntarily withdrawn the last semblance of a claim to the premises on behalf of its wards, without any pretense of fraud, or allegation to show any contractual or trust relations, now seeks to maintain that on the understanding of all parties these rights were preserved. Such a contention answers itself.

CONCLUSIONS.

1. *The defendants in error hold under a patent containing no reservations, and such patent is conclusive against the plaintiffs in error.*

2. *The patent being conclusive of the right of defendants in error to recover, there is no pleading or testimony competent to modify or affect it.*

3. *The decision of the prefect and the grant of exclusive possession by the Governor are conclusive of the fact that the land was vacant and unoccupied.*

4. *If it be assumed that plaintiffs in error had any valid right or claim under the laws of Mexico, such right or claim should have been presented to the Board of Land Commissioners appointed under the act of 1851.*

5. *The decision of the Land Commissioners and other appropriate officers of the government of the United States, holding that the land in question was at the time it was patented vacant and subject to absolute alienation is conclusive upon the plaintiffs in error and all others.*

6. *If the plaintiffs in error claim under a title derived from the Mexican government, admitting, as they must, that such title has not been presented, they cannot avail themselves of the presentation of Warner's title, unless they can show that Warner was their trustee and received the legal title under such circumstances as to justify a court of equity in declaring that he*

(Warner) held such title for the benefit of the plaintiffs in error. There is neither pleading nor proof to sustain this theory.

7. *Warner did not claim title to the Valle de San Jose, described in his patent, in consequence of any grant made to plaintiffs in error, or either of them; but claimed and held the same in hostility to the pretensions of the plaintiffs in error; therefore no trust relation existed between Warner and the Indians.*

8. *The survey and the approval thereof after public notice containing no reservation or indication of any Indian rights is an adjudication by the political department of the government that no rights are reserved to them.*

9. *The political department of the government having adjudicated the validity of Warner's title and right to possession the ordinary courts of justice have no jurisdiction to pass upon the controversy.*

10. *Under the laws of Spain and Mexico the status of these Indians was such as to disqualify them from interfering with the grant. The United States did not assume, either by its treaty or otherwise, to support or maintain any Indian claim, nor any previous practice or policy. No law of Spain or Mexico granted California land to the Indians and no such grant has ever been affirmed directly or indirectly by the United States; and independently of the failure of the*

plaintiffs in error to present their claim to the Board of Land Commissioners no right accrued to them to the fee in the land or to the possession thereof under any law of Spain or Mexico.

We respectfully submit that the judgment of the Supreme Court of the State of California should be affirmed.

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CASSIUS CARTER,
For Defendants in Error.

APPENDIX.

TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLMENT BETWEEN THE UNITED STATES OF AMERICA AND THE MEXICAN REPUBLIC.

Dated at Guadalupe Hidalgo, 2d February, 1848; ratified by the President U. S., 16th March, 1848; exchanged at Queretaro, 30th May, 1848; proclaimed by the President U. S., 4th July, 1848.

ARTICLE I.

(Peace.)

There shall be firm and universal peace between the United States of America and the Mexican Republic, and between their respective countries, territories, cities, towns, and people, without exception of places or persons.

ARTICLE II.

(Suspension of Hostilities.)

ARTICLE III.

(Raising Blockades—Withdrawal of Troops, etc.)

ARTICLE IV.

(Restoration of Castles, Forts, Prisoners, etc.)

ARTICLE V.

(Boundary Line.)

ARTICLE VI.

(Navigation of Gulf of California and Colorado River.)

ARTICLE VII.

(Navigation of Gila River and Rio Bravo del Norte.)

ARTICLE VIII.

(Privileges of Mexicans—Citizenship—Property of Non-Resident Mexicans.)

Mexicans now estal lished in territories previously belonging to Mexico, and which remain for the fu-

ture within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican Citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratification of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy, with respect to it, guarantees equally ample as if the same belonged to citizens of the United States.

ARTICLE IX.

Admission of Mexicans to Citizenship in the United States.

The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE X.

(Stricken Out.)

[All grants of land made by the Mexican government, or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico. But the grantees of land in Texas, put in possession thereof, who by reason of the circumstances of the country since the beginning of the troubles between Texas and the Mexican government, may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfill the said conditions within the periods limited within the same respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty; in default of which the said grants shall not be obligatory upon the state of Texas, in virtue of the stipulations contained in this article. The foregoing stipulation in regard to grantees of land in Texas is extended to all grantees of land in the territories aforesaid elsewhere than in Texas, put in possession under such grants; and in default of the fulfillment of the conditions of any such grant within the new period, which, as above stipulated, begins with the day of the exchange of ratifications of this treaty, the same shall be null and void.]

ARTICLE XI.

(Incursions of Savages into Mexican Territory.)

Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this may be necessary;

and that, when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory against its own citizens.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two republics, nor to purchase or acquire horses, mules, cattle or property of any kind, stolen within Mexican territory by such Indians.

And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the government of the latter engages and binds itself in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them, and return them to their country, or deliver them to the agent or representative of the Mexican government. The Mexican authorities will, as far as practicable, give to the government of the United States notice of such capture; and its agent shall pay the expenses incurred in the maintainance and transmission of the rescued captives; who, in the meantime, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will proceed forthwith to effect their release and delivery to the Mexican agent as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the government of the United States will now and hereafter pass, without unnecessary delay, and

always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said government when providing for the removal of the Indians from any portion of the said territories, or for its being settled by the citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

ARTICLE XII.

(Fifteen Million Dollars to be aid to Mexico.)

ARTICLE XIII.

(Assumption, by the United States, of Claims Against Mexico.)

ARTICLE XIV.

(Discharge of Claims of American Citizens Against Mexico.)

ARTICLE XV.

(Satisfaction of Claims.

ARTICLE XVI.

(Fortifications for Security.)

Each of the contracting parties reserves to itself the entire right to fortify whatever point within its territory it may judge proper so to fortify, for its security.

ARTICLE XVII.

(Treaty of Amity, Commerce and Navigation.)

ARTICLE XVIII.

(Supplies for American Troops Previous to Evacuation.)

ARTICLE XIX.

(Rules of Importation into Mexican Ports.)

ARTICLE XX.

(Certain Property to be Admitted to Entry.

ARTICLE XXI.

(Future Disagreement—Arbitration.

ARTICLE XXII.

(War—Private Property—Respect for Churches, etc.—Prisoners of War.)

ARTICLE XXIII.

(Ratification of Treaty.)

PROTOCOL.

In the City of Queretaro, on the twenty-sixth of the month of May, eighteen hundred and forty-eight, at a conference between their excellencies Nathan Clifford and Ambrose H. Sevier, Commissioners of the U. S. of A., with full powers from their government to make to the Mexican Republic suitable explanations in regard to the amendments which the Senate and Government of the said United States have made in the treaty of peace, friendship, limits and definitive settlement between the two Republics signed in Guadalupe Hidalgo, on the second day of February of the present year; and His Excellency Don Luis de la Rosa, Minister of Foreign Affairs of the Republic of Mexico; it was agreed, after adequate conversation, respecting the changes alluded to, to record in the present protocol the following explanations, which their aforesaid excellencies, the Commissioners gave in the name of their government and in fulfillment of the commission conferred upon them near the Mexican Republic:

1st. The American government by suppressing the IXth article of the treaty of Guadalupe Hidalgo and substituting the IIId article of the treaty of Louisiana, did not intend to diminish in any way what was agreed upon by the aforesaid article IXth in favor of the inhabitants of the territories ceded by Mexico. Its understanding is that all of that agreement is contained in the 3d article of the treaty of Louisiana. In consequence, all the privileges and guarantees, civil, political and religious, which have been possessed by the inhabitants of the ceded territories, if the IXth article of the treaty had been retained, will be enjoyed by them, without any difference, under the article which has been substituted.

2d. The American government by suppressing the Xth article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territory are those which were legitimate titles under the Mexican law in California and New Mexico, up to the 13th of May, 1846, and in Texas up to the 2d March, 1836.

3d. The government of the United States, by suppressing the concluding paragraph of Article XIIth of the treaty, did not intend to deprive the Mexican Republic of the free and unrestrained faculty of ceding, conveying or transferring at any time (as it may judge best) the sum of the twelve millions of dollars which the said government of the United States is to deliver in the places designated by the amended article.

And these explanations having been accepted by the Minister of Foreign Affairs of the Mexican Republic, he declared, in the name of his government, that with the understanding conveyed by them the same government would proceed to ratify the treaty of Guadalupe, as modified by the Senate and Government of the U. States. In testimony of which the Minister, have signed and sealed, in quintuplicate, the present protocol.

(Seal.) A. H. SEVIER.

(Seal.) NATHAN CLIFFORD.

(Seal.) LUIS DE LA ROSA.

AN ACT TO ASCERTAIN AND SETTLE THE PRIVATE LAND CLAIMS IN THE STATE OF CALIFORNIA. (1.)

(Approved March 3, 1851.)

That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

Sec. 2. That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

Sec. 3. That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

Sec. 4. That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interest of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the

(1.) Continued in force until March, 1855, by the 18 Jan., 1854, and until March, 1856, by the 10 Jan., 1855, ch. 25.)

United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

Sec. 5. That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

Sec. 6. That the said commissioners, when sitting as a board and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending before the commissioners, and that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

Sec. 7. That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpœna commanding the attendance of a witness or witnesses before the said board or any commissioner.

Sec. 8. That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claim; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the

evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

Sec. 9. That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petiton, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which peution, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and if the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall

be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the case shall stand for trial, unless, on cause shown, the same shall be continued by the Court.

Sec. 10. That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by the order of the said Court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said Court shall prescribe; and if the Court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

Sec. 11. That the commissioners herein provided for, and the District and Supreme Court, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

Sec. 12. That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of the proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

Sec. 13. That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been pre-

sented to the said commissioners within two years after the date of this act shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the Surveyor-General of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor-general shall have the same power and authority as are conferred on the registrar of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: Provided, always, That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. And provided, further, That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

Sec. 14. That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town; or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be *prima facia* evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.

Sec. 15. That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

Sec. 16. That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

Sec. 17. That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the

rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

Sec. 18. That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty-five cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

AN ACT TO EXPEDITE THE SETTLEMENT OF TITLES TO LAND IN THE STATE OF CALIFORNIA—Approved July 1, 1864.

Be it enacted by the Senate and House of Representatives, of the United States of America in Congress assembled, That whenever the surveyor-general of California shall, in compliance with the thirteenth section of an act entitled, "An Act to ascertain and settle the private land claims in the State of California," approved March third, eighteen hundred and fifty-one, have caused any private land claim to be surveyed and a plat to be made thereof, he shall give notice that the same has been done by a publication once a week, for four consecutive weeks, in two newspapers, one published in the city of San Francisco, and one published near the land surveyed; and shall retain in his office, for public inspection, the survey and plat until ninety days from the date of the first publication in San Francisco shall have expired; and if no objections are made to said survey, he shall approve the same, and transmit a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval; but if objections are made to said survey within the said ninety days, by any party claiming to have an interest in the tract

embraced by the survey, or in any part thereof, such objections shall be reduced to writing stating distinctly the interest of the objector, and signed by him or his attorney, and filed with the surveyor-general, together with such affidavits or other proofs as he may produce in support of his objections. At the expiration of said ninety days the surveyor-general shall transmit to the Commissioner of the General Land Office at Washington a copy of the survey and plat, and objections, and proofs filed with him in support of the survey, together with his opinion thereon; and if the survey and plat are approved by the said Commissioner, he shall endorse thereon a certificate of his approval. If disapproved by him, or if, in his opinion, the ends of justice would be subserved thereby, he may require a further report from the surveyor-general of California touching the matters indicated by him, or proofs to be taken thereon, or may direct a new survey and plat to be made. Whenever the objections are disposed of, or the survey and plat are corrected, or a new survey and plat are made in conformity with his directions, he shall indorse upon the survey and plat adopted his certificate of approval. After the survey and plat have been, as hereinbefore provided, approved by the Commissioner of the General Land Office, it shall be the duty of the said Commissioner to cause a patent to issue to the claimant as soon as practicable after such approval.

Sec. 2. *And, be it further enacted* That the provisions of the preceding section shall apply to all surveys and plats by the surveyor-general of California heretofore made, which have not already been approved by one of the District Courts of the United States for California, or by the Commissioner of the General Land Office: *Provided*, That where proceedings for the correction or confirmation of a survey are pending on the passage of this act in one of the said District Courts, it shall be lawful for such District Court to proceed and complete its examination and determination of the matter, and its decree thereon shall be subject to appeal to the Circuit Court of

the United States for the district in like manner, and with like effect, as hereafter provided for appeals in other cases to the Circuit Court; and such appeals may be in like manner disposed of by the said Circuit Court.

Sec. 3. *And, be it further enacted*, That where a plat and survey have already been approved or corrected by one of the District Courts of the United States for California, and an appeal from the decree of approval or correction has already been taken to the Supreme Court of the United States, the said Supreme Court shall have jurisdiction to hear and determine the appeal. But where from such decree of approval or correction no appeal has been taken to the Supreme Court, no appeal to that Court shall be allowed, but an appeal may be taken, within twelve months after this act shall take effect, to the Circuit Court of the United States for California, and said Circuit Court shall proceed to fully determine the matter. The said Circuit Court shall have power to affirm, or reverse, or modify the action of the District Court, or order the case back to the surveyor-general for a new survey. When the case is ordered back for a new survey, the subsequent survey of the surveyor-general shall be under the supervision of the Commissioner of the General Land Office, and not of the District or Circuit Court of the United States.

Sec. 4. *And be it further enacted*, That whenever the district judge of any one of the District Courts of the United States for California is interested in any land, the claim to which, under the said Act of March third, eighteen hundred and fifty-one, is pending before him, on appeal from the Board of Commissioners created by said act, the said District Court shall order the case to be transferred to the Circuit Court of the United States for California, which court shall thereupon take jurisdiction and determine the same. The said District Court may also order a transfer to the said Circuit Court of any other cases arising under said act, pending before them, affecting the title to lands within the corporate limits

of any city or town, and in such cases both the district and circuit judges may sit.

Sec. 5. *And, be it further enacted*, That all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California, on the fifteenth of April, one thousand, eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said State, approved on the eleventh of March, eighteen hundred and fifty-eight, entitled "An Act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the Common Council of said city," there being excepted from this relinquishment and grant all sites or other parcels of land which have been, or now are, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States, within one year after the rendition to the General Land Office by the surveyor-general of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of public surveys: *And provided*, That the relinquishment and grant by this Act shall in no manner interfere with or prejudice any bona-fide claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof.

Sec. 6. *And, be it further enacted*, That it shall be the duty of the surveyor-general of California to cause all the private land claims finally confirmed, to be accurately surveyed, and plats thereof to be made whenever requested by the claimants: *Provided*, That each claimant requesting a survey and plat shall first deposit in the District Court of the District within which the land is situated, a sufficient sum of money to pay the expenses of such survey and plat, and of the publication required by the first sec-

tion of this act. Whenever the survey and plat requested shall have been completed and forwarded to the commissioner of the General Land Office, as required by this act, the District Court may direct the application of the money deposited, or so much thereof as may be necessary, to the payment of the expenses of said survey and publication.

Sec. 7. *And, be it further enacted,* That it shall be the duty of the surveyor-general of California, in making surveys of the private land claims finally confirmed to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim. But when such decree only designates only the out-boundaries within which the quantity confirmed is to be taken, the location of such quantity shall be made, as near as practicable, in one tract, and in a compact form, and if the character of the land, or intervening grants, be such as to render the location impracticable in one tract, then each separate location shall be made, as near as practicable in a compact form. And it shall be the duty of the Commissioner of the General Land Office to require a substantial compliance with the directions of this section, before approving any survey and plat forwarded to him.

Sec. 8. *And, be it further enacted,* That the act entitled "An Act to amend an act entitled 'An Act to define and regulate the jurisdiction of the District Courts of the United States in California' in regard to the survey and location of confirmed private land claims," approved June fourteenth, eighteen hundred and sixty, and all provisions of law inconsistent with this act, are hereby repealed.

SIETE PARTIDAS.

(Moreau and Carlton's translation, Vol. I, p. 486.)

PARTIDA THIRD—TITLE XXXI.

Of the services which some things have upon others, and how they are created.

LAW 1.

What a service is, and how many sorts there are.

The sages have properly said that a service

(*servidumbre*) is the right and use which one man has in the buildings and estates of another, to use them for the benefit of his own. There are two kinds of service. The first is, that which one house has on another, and which in latin is called *urbana* The second is that which one estate has on another, and is called in latin *rustica*. There are likewise other services which a man has in the things of another, for his personal advantage, and not for the particular advantage of his estate. As where he has the usufruct of gathering the products of another's estate; or the use of the house in which he dwells, or of the houses of another; or of the work of slaves who are artisans or laborers. We shall speak of each of those in the laws of this title.

LAW 3.

What are denominated rural (rustica) services; and how many kinds there are.

We have said that a rural service was that which one estate has in another: as where a man has a path, road, or way through another's estate, to pass in or out of his own. And we say that when one grants the right of a path (*senda*) through his estate, the grantee may pass through the place where it was designated, either on foot, horseback, or alone, or with other persons, provided they go the one before the other, and not abreast: but he cannot pass there with carriages, nor lead packed horses by hand. And if one grants the right of a carriage way (*carrera*,) the grantee may pass there with carriages, and the other things mentioned above. And if a man grant a road (*via*) through his estate, then we say the grantee may pass there on foot, on horseback, either alone, or in company; or he may convey along there, carts, wood, stone, or any other thing necessary for the benefit of the estate, for which the service was created. And the road ought to be of the width and in the place agree upon between the parties at the time it was granted and if no agreement had been made in this respect, then we say, it ought to be eight feet wide. And if it should not be straight, on ac-

count of windings or angles, it ought to be sixteen feet wide in those places, in order that carriages may turn.

LAW 14.

In how many ways a service may be imposed upon things.

Every service that we have mentioned in the laws of this title which one house, or thing can owe another, may be imposed in the three following ways: The first, where the proprietor of a thing voluntarily imposes upon it, a service in favor of another person, either through affection, or for a price which he receives of him. The second is that which is granted by will: as where the testator says: "I consent that the house of such a one enjoy a service upon my house, which shall never be raised higher than it now is"; or that "he may put the beams of his house upon the walls of mine;" or where he grants any other similar service; as the right of way to enter and pass out of his estate, or to draw water for the purpose of watering the lands of the grantee, or other the like. The third is where one acquires a service upon the estate, or house of another, by prescription, as we shall hereafter show.

LAW 20.

Of services called usufruct, or simply use.

We have fully treated in the preceding laws, of the services which one house, or building, or estate, may owe another. We shall now speak of the third sort of services mentioned in the second law of this title: That is to say, the service which a man enjoys in the house or estate of another, for his personal advantage and not for the particular advantage of his estate. And we say, there are three ways in which one may have a personal service upon the things of another. The first is where one man grants to another, for the whole of his life, or for a certain time, the usufruct of his estate, house, slaves, or cattle, or other things which afford a revenue or fruits. This usufruct may be granted either by contract or will. But the grantee ought to gather the fruits in good faith, first giving

security that the thing of which he has the usufruct, shall not be lost or deteriorated by his fault, or by gathering therefrom, more than it is proper he should take; and that in case he should die, or the time of his usufruct expire, in any other manner, the thing shall be restored to the grantor, or to the person to whom he might order it to be restored, or to his heirs, if he be dead. And the usufructary will acquire a right to all the fruits and revenues of the thing upon which the usufruct is granted, and may turn them to his own profit, or sell them, if he choose; but he cannot sell, or pledge the thing itself. The second is where a man grants the use only of his house, or estate, or other things; in that case, the grantee can not enjoy the thing of which the use is granted, so fully as the usufructary can do. For he who has the use only of a thing cannot gather more of its fruits than are necessary for his support. As where the use of a garden is granted to him, he may take of its fruits or plants, so much as is necessary for his consumption, and that of his family; but he cannot take any, to give to others, or to sell. And so we say it would be, where any one had granted to another, the use of his meadow, vineyard, or other thing. And we moreover say that a man cannot sell or pledge the thing of which he has the use; and that he ought to give good security that he will use the thing, in good faith, as a prudent man, and that it shall not be damaged, or deteriorated, or lost by his fault.

LAW 22.

What the usufructuary ought to do for the thing, the usufruct of which is granted to him; and that he ought to preserve, improve, repair and cultivate it.

It is but right and just, that the usufructary of a house, or an estate, or cattle, since he enjoys the profits thereof, should appropriate all he could, to improve, preserve, and faithfully keep the thing itself; so that if it be a house, he should repair and preserve it, that it might not fall or be deteriorated by his fault; or if it be an estate, vineyard, or garden, he ought to cultivate and improve it; and if he took any

trees therefrom, he ought to plant others in their place; or if the usufruct be of cattle and some of them die, he ought to replace them by their increase, and rear others in their place. And if the thing itself be subject to the payment of tythes, or other tribute, or impost; they ought to be paid by the usufructary out of the fruits it yielded, so that the thing remain to the owner entire and unencumbered. But a person who enjoys the use of a thing, is not bound to do what is above mentioned, for the benefit of the thing to the use; unless the thing is so inconsiderable that the whole of its fruits were consumed in the enjoyment of the use; for then he will be obliged to improve, preserve and pay for it, in the manner above prescribed.

LAW 24.

In how many ways the usufruct which one man has of the things of another, may be extinguished.

It is in the course of nature that every thing which man promise by word, or execute by deed, shou'd cease to have effect, however firmly it may have been done. Since therefore we have shown in the preceding laws, the manner in which a usufruct, as well as a simple use, may be established; we will now speak of the manner in which they may be extinguished, or destroyed. And we say that if the grantee of a usufruct, or simple use, die, or be perpetually banished to some island; or if he had been enfranchised, and afterwards fell again into slavery, for some crime he had committed; or if being free, he had himself consented to be sold, as a slave, the usufruct or use which he enjoyed in any thing, would thereby be lost, and the thing itself would be restored to the original proprietor, and so it would be where neither the grantee, nor any person in his name, make use of the usufruct, or use during ten years, while he was in the country, or twenty years while he was out of it: he would then lose both by prescription, and the thing would be again restored to the original proprietor: we likewise say that if the grantee sell to another, the right he had to the thing, both the use and usufruct would be thereby extinguished, and the

thing will return to the original proprietor, so that neither the grantee nor his vendee can afterwards enjoy them. For though the grantee may lease to another, his right of usufruct of a thing; nevertheless he cannot alienate that right. We likewise say that when he who has the right of usufruct in a thing, acquires the property in the thing itself; the usufruct is thereby extinguished, as the property and the usufruct of the thing, are united in the same person.

TRANSLATION OF THE DECREE OF THE MEXICAN CONGRESS OF AUGUST 18TH, 1824, RESPECTING COLONIZATION.

(The translation is taken from White's New Recopilacion, Vol. I, p. 160.)

The Supreme Executive Power, provisionally appointed by the General Sovereign Constituent Congress, to all who shall see and understand these presents: Know ye, that the said Congress has decreed as follows:

Article 1. The Mexican nation offers to foreigners, who come to establish themselves within its territory, security for their persons and property; provided they subject themselves to the laws of the country.

Art. 2. This law comprehends those lands of the nation, not the property of individuals, corporations or towns, which can be colonized.

Art. 3. For this purpose, the Legislatures of all the states will, as soon as possible, form colonization laws, or regulations, for their respective states, conforming themselves, in all things, to the constitutional act, general constitution, and the regulations established in this law.

Art. 4. There cannot be colonized any land comprehended within twenty leagues of the limits of any foreign nation, nor within ten leagues of the coasts, without the previous approbation of the General Supreme Executive Power.

Art. 5. If, for the defense and security of the nation, the Federal Government should deem it necessary to use any portion of these lands, for the construction of warehouses, arsenals, or other public edifices, they can do so, with the approbation of the General Congress, or, in its recess, of the Council of Government.

Art. 6. Until after four years from the publication of this law, there shall not be imposed any tax whatever on the entrance of foreigners who come to establish themselves for the first time in the nation.

Art. 7. Until after the year 1840, the General Congress, shall not prohibit the entrance of any foreigner, as a colonist, unless imperious circumstances should require it, with respect to the individuals of a particular nation.

Art. 8. The government without prejudicing the objects of this law, shall take such precautionary measures, as it may deem expedient, for the security of the Confederation, as respects the foreigners who come to colonize.

Art. 9. A preference shall be given, in the distribution of lands, to Mexican citizens, and no other distinction shall be made in regard to them, except that which is founded on individual merit, or services rendered the country, or, under equal circumstances, a residence in the place where the lands to be distributed are situated.

Art. 10. The military who, in virtue of the offer made on the 27th March, 1821, have a right to lands, shall be attended to by the States, in conformity with the diplomas which are issued to that effect, by the Supreme Executive Power.

Art. 11. If, in virtue of the decree alluded to in the last Article, and taking into view the probabilities of life, the Supreme Executive Power should deem it expedient to alienate any portion of land, in favor of any officer, whether civil or military, of the Federation, it can do so from the vacant lands of the Territories.

Art. 12. It shall not be permitted to unite, in the same hands with the right of property, more than one

league square of land, suitable for irrigation, four square leagues in superficies, or arable land, without the facilities of irrigation, and six square leagues in superfices, of grazing land.

Art. 13. The new colonists shall not transfer their property in mortmain (*Manus muertos.*)

Art. 14. This law guarantees the contracts which the empressarios make with the families which they bring, at their own expense, provided they are not contrary to the laws.

Art. 15. No person who by virtue of this law acquires a title to lands shall hold them if he is domiciled out of the limits of the Republic.

Art. 16. The Government, in conformity with the provisions established in this law, will proceed to colonize the territories of the Republic.

Monterey, 18th August, 1824.

CAYETANO IBARRA, President.
PEDRO DE AHUMADA,
Member and Secretary.
MANUEL DE VILLAY COCIO,
Member and Secretary.

Therefore, we command it to be printed, circulated and obeyed.

NICHOLAS BRAVO,
VICENTE GUERRERO,
MIGUEL DOMINGUEZ,
Members of the Supreme Executive Power.

TRANSLATION OF THE GENERAL RULES AND REGULATIONS FOR THE COLONIZATION OF TERRITORIES OF THE REPUBLIC OF MEXICO, NOVEMBER 21, 1828.

(The translation is taken from Rockwell's Spanish and Mexican law in relation to Mines and Titles to Real Estate, Vol. I, p. 453.)

It being stipulated, in the sixteenth Article of the General Law of Colonization, of the 18th of August, 1824, that the Government, in conformity with the principles established in said law, shall proceed to the

colonization of the territories of the Republic; and it being very desirable, in order to give to said Article the most punctual and exact fulfillment, to dictate some general rules for facilitating its execution, in such cases as may occur, his Excellency has seen fit to determine on the following Articles:

1st. The Governors (*Gefes Politicos*) of the territories in compliance with the law of the General Congress, of the 18th of August, 1824, and under the conditions hereafter specified, to grant vacant lands, in their respective territories, to such contractors, (*empressarios*) families, or private persons, whether Mexicans or foreigners, who may ask for them, for the purpose of cultivating and inhabiting them.

2d. Every person soliciting lands, whether he be an *empressarios* head of a family, or private person, shall address to the Governor of the respective territory a petition, expressing his name, country, profession, the number, description, religion, and other circumstances of the families, or persons, with whom he wishes to colonize, describing as distinctly as possible, by means of a map, the land asked for.

3d. The Governor shall proceed, immediately, to obtain the necessary information whether the petition embraces the requisite conditions required by said law of the 18th of August, both as regards the land and the candidate, in order that the petitioner may at once be attended to; or, if it be preferred, the respective municipal authority may be consulted, whether there be any objection to making the grant or not.

4th. This being done, the Governor will accede, or not, to such petition, in exact conformity to the laws on the subject, and especially to the before mentioned one of the 18th of August, 1824.

5th. The grants made to families, or private persons, shall not be held to be definitively valid without the previous consent of the Territorial Deputation, to which end the respective documents (*expedientes*) shall be forwarded to it.

6th. When the Governor shall not obtain the approbation of the Territorial Deputation, he shall

report to the Supreme Government forwarding the necessary documents, for its decision.

7th. The grants made to *empressarios*, for them to colonize with many families, shall not be held to be definitively valid until the approval of the Supreme Government be obtained; to which the necessary documents must be forwarded, along with the report of the Territorial Deputation.

8th. The definitive grant asked for being made a document, signed by the Governor, shall be given, to serve as a title, to the party interested, wherein it must be stated that said grant is made in exact conformity with the provisions of the laws, in virtue whereof possession shall be given.

9th. The necessary record shall be kept, in a book destined for the purpose, of all the petitions presented and grants made, with the maps of the lands granted, and the circumstantial report shall be forwarded, quarterly, to the Supreme Government.

10th. No *capitulization* shall be admitted for a new town, except the *capitulizator* bind himself, to present, as colonists, twelve families, at least.

11th. The Governor shall designate to the new colonists a proportionate time, within which he shall be bound to cultivate, or occupy the land on the terms, and with the number of persons, or families, which he may have *capitulized* for, it being understood that if he does not comply, the grant of the land shall remain void; nevertheless, the Governor may revaliditate it, in proportion to the part which the party may have fulfilled.

12. Every new colonist, after having cultivated or occupied the land, agreeable to his *capitulization*, will take care to prove the same before the municipal authority, in order that, the necessary record being made, he may consolidate and secure his right of ownership, so that he may dispose freely thereof.

13th. The reunion of many families into one town shall follow, in its formation, interior government, and policy, the rules established by the existing laws for the other towns of the Republic special care being

taken that the new ones are built with all possible regularity.

14th. The *minimum* of irrigable land to be given to one person for colonization shall be 200 varas square, the *minsmum* of land called *de temporal* shall be 800 varas square, and the *minimum* for breeding cattle (*de obsevadeso*) shall be 1,200 varas square.

15. The land given for a house lot shall be 100 varas square.

16th. The spaces which may remain between the colonized lands may be distributed among the adjoining proprietors, who shall have cultivated theirs with the most application, and have not received the whole extent of land allowed by the law, or to the children of said proprietors, who may ask for them, to combine the possession of their families; but on this subject particular attention must be paid to the morality and industry of the parties.

17th. In those territories where there are missions the lands occupied by them cannot be colonized at present, nor until it be determined whether they are to be considered as the property of the establishments of the neophytes, catechumens, and Mexican colonists.

TRANSLATION OF DECREE OF THE CORTES, 4TH OF JANUARY, 1813.

(Hall Mexican Law page 45.)

The general and extraordinary cortes considering that the reduction of the common lands to private dominion is one of the provisions which the welfare of the pueblos and improvement of agriculture and industry most imperiously claim, and wishing at the same time to give with this class of lands an aid to the public necessities, by a premium to the well-merited defenders of the country and a help to the citizens not proprietors, they decree:

Land reduced to Private Ownership.—1. All the vacant or crown lands and municipal property (*propios and arbitrios*) with wooded lands and

lands not wooded, as well on the peninsula and adjacent islands as in the provinces beyond the seas, except the *exidos* necessary for the pueblos, shall be reduced to private property taking care that in those of *propios* and *arbitrios* their annual incomes be supplied by the most opportune means, which by the proposal of the respective provincial deputations the cortes, shall approve.

Titles to be in fee.—In whatever manner the lands shall be distributed, it shall be in fee and with the right of inclosure, in order that the owners may inclose them (without prejudice to the sheep walks (*canadas*), cross-ways, watering-places, and services), and enjoy them freely and exclusively, and destine them to the use or cultivation which may best suit them; but they can not ever entail them, or pass them at any time into mortmain.

(Then follow provisions for the distribution of the land containing no reference to the Indians.

DECREE OF THE 13TH OF SEPTEMBER, 1813.
"*Colleccion de Decretos*," p. 106.

"In which it is commanded that the settlements of Indians reduced to Christianity by the conventual priesthood of Ultramar be delivered to and remain at the disposition of the ordinary clergy.

The general and extraordinary Cortes, in consequence of the representations of Don Jose de Olagurra in the name of the Rev. Bishop-elect of Guyana, Don Jose Ventura Cabello, concerning the evils, which as well in morals as in politics, afflict that province, in that the settlements of Indians entrusted to missions, in which are employed *capidien* and *herefoot* priests, have not been *delenient* to the ordinary priesthood even, when, thirty, forty, fifty, and more years gentilism to our Catholic religion; have come to decree and do decree:

1. All the recent reductions and religious *intendencus* doctrines of the provinces of Ultramar which may be in charge of missionary clergy, which have been reduced ten years, must be immediately delivered to the respective ordinary clergy, without any

excuse or pretext, in conformity to the laws and cedulas in that behoof.

VI. The missionary clergy must immediately, cease to exercise the government or administration of the *haciendas* (estates) of those Indians, it remaining to the care and election of the Indians to dispose by means of their *Ayuntamientos*, and with the intervention of the superior political chief there must be named from among them those who shall be to his satisfaction, and who may have most intelligence to administer them, *distributing the lands* and reducing them to particular ownership in accordance with the Decree of 4 of January, 1813, upon the reduction of the Balchos and other lands to individual ownership."

209.

MAR 16 1901

JAMES H. MCKENNEY,
Clerk.

Supplementary Brief for Defendants in Error

SUPREME COURT OF THE UNITED STATES

October Term, 1900

No. 209.

ALLEJANDRO BARKER, BALERINA BARKER, ANGELA BARKER, ET ALS.,

Plaintiffs in Error,

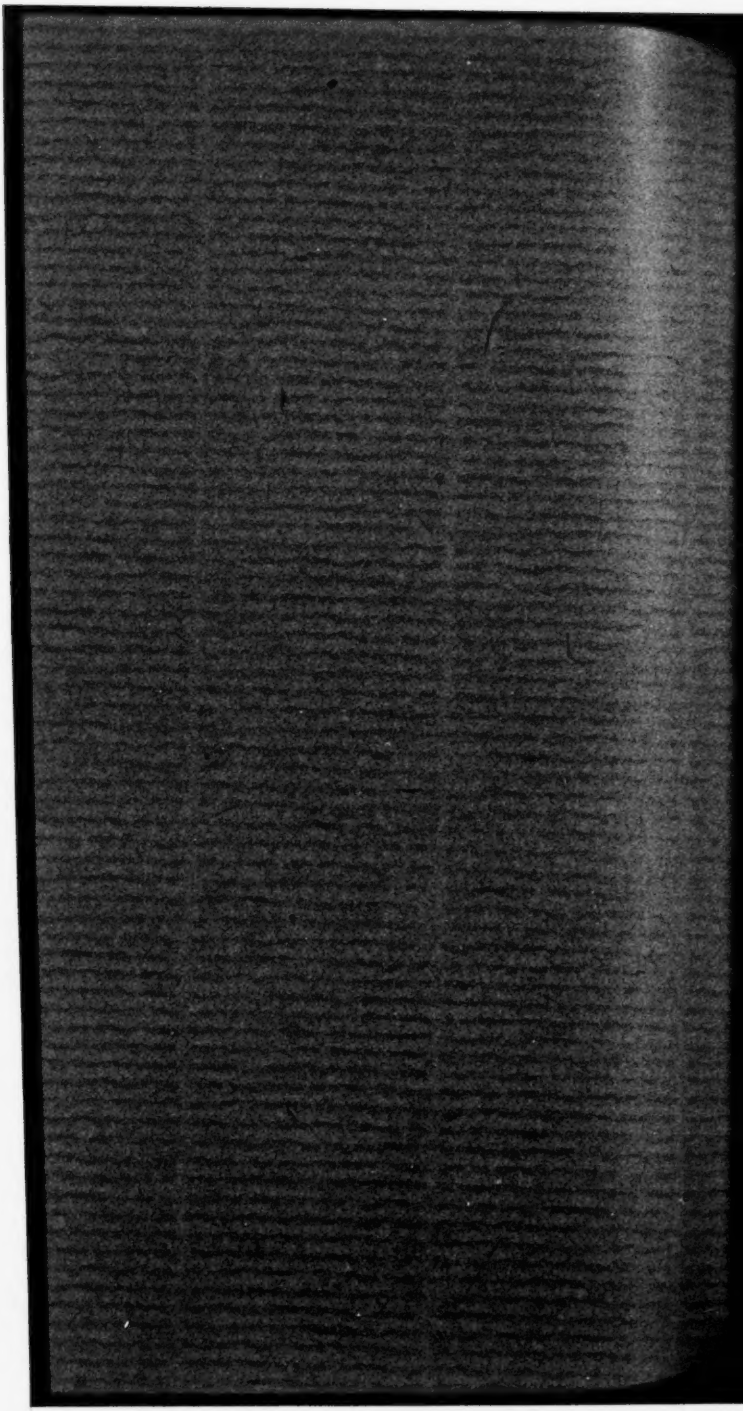
vs.

DOWNEY HARVEY, Administrator of the Estate of John G. Downey, Deceased, and THE MERCHANTS' EXCHANGE BANK OF SAN FRANCISCO,

Defendants in Error.

STEPHEN M. WHITE,
CHARLES MONROE,
DAVID S. WELLINGTON,
CASSIUS CARTER,

Attorneys for Defendants in Error.



IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1900.

No. 209.

ALLEJANDRO BARKER, et ali.,
Plaintiffs in Error,
vs.
J. DOWNEY HARVEY, et al.,
Defendants in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

We crave the indulgence of the Court for a short supplemenal brief in this cause. Owing to the distance of the parties from Washington our brief was prepared before the filing of the brief for the plaintiffs in error, and we desire shortly

to call attention to some matters referred to in that brief, and also to make one point which we had not made and which the brief of plaintiffs in error recalled to our attention.

I.

The contention of plaintiffs in error that so much of Byrne vs. Alas as holds that under Spanish and Mexican law "whenever Indian settlements are established and the Indians till the ground they have a right of occupancy in the lands they need and use, and whenever a grant is made to include such settlements the grant is subject to such occupancy" is left in full force and effect, is not sustained in our judgment by an examination of the case of Harvey vs. Barker. The Court in that case say "Bryne vs. Alas can no longer be considered as authority." It is true that the Court add that this was "more especially as to the consequences resulting from the non-presentation of claims of title to land arising under the laws of Spain or Mexico, and the scope and effect of patents based upon such claims of title." But this language follows a discussion of the opinion of the Court in Byrne vs. Alas in which the Indian rights claimed by the plaintiffs in error are characterized as "asserted rights of the Mission or Pueblo Indians under the Spanish or Mexican regime," and these rights

are further characterized as "alleged rights," and the entire discussion of the Court shows that while the Court did not deem it necessary to expressly repudiate the existence of such alleged rights that the doctrine of Bryne vs. Alas upon this point was not approved by the Court and was not specifically overruled, since in the judgment of the Court the existence of such alleged rights were immaterial to the discussion, since the "grant to Warner neither reserved nor preserved any possessory or other right or supposed rights in the Indians" for the obvious reason that the prefect had reported the land to be vacant and abandoned, and, as is said by the Court in their opinion. "Therefore if it were permitted to go behind the patent — to the grant itself there was no defense on the part of the appellants (plaintiffs in error) to the plaintiffs' (defendants in error) action."

It is worth observing on this point that the evidence in this case does not show that at the time of the grant in 1844 the Indians tilled this ground. The evidence of Warner, which is the most satisfactory on this point, shows that there were but ten families at that time at Agua Caliente. Whatever planting the Indians did he says did them little good. They were evidently nomadic and lived, as we have shown in our brief, in other ways than by tilling the soil.

II.

The ingenious argument of the plaintiffs in error that this Court is bound by that portion of the opinion in Byrne vs. Alas, which they contend is not overruled in Harvey vs. Barker, to overrule the case of Harvey vs Barker in that portion in which it overrules Byrne vs. Alas, when analyzed answers itself. In effect this argument is that Byrne vs. Alas is not overruled by Harvey vs. Barker since the Court say that the conditions of the grant in Harvey vs. Barker are different from the conditions of the grant considered in Byrne vs. Alas, and therefore the Court found it unnecessary to overrule so much of Harvey vs. Barker as declares the Indian rights claimed by plaintiffs in error. But, say the plaintiffs in error, continuing their argument, the Court in Harvey vs. Barker are in error in supposing there was any difference in the circumstances under which the two grants were made, and therefore this Court being bound by the overruled decision should overrule the later decision in which it was overruled.

Conceding the premises of plaintiffs in error, is not the logical conclusion that this court is bound by the opinion of the Supreme Court in California in the case at bar, being the latest declaration of that Court and the application by that Court of the law to the facts in this very

case, and is it not further true, as we will show, that this Court is without jurisdiction in this matter and should dismiss the cause?

III.

Plaintiffs in error make an specious but fallacious argument to show that the grant to Warner did not include the Agua Caliente. We have disposed of this contention in our brief, certainly it is idle to discuss it further than to call attention to the fact again that the *expediente* shows that the property of the San Luis Rey mission, namely, a church which Warner was to pay for and whice was within the grant to him, was in the Indian village at Agua Caliente. The counsel in their citation of Warner's description are not quite fair in leaving out that portion in which he says "In petitioning for my grant I intended to include the whole valley, including Agua Caliento" (Tr. fol. 81) and the preceding testimony in which he declares that he alluded, when he spoke, to the Valle San Jose which included the premises described in the previous grant to Pico (Tr. fol. 79) and that the Pico vineyard was included in his grant and that he took possession and maintained the vineyard (Tr. fol. 79-80) It is interesting to note that Warner also testifies that the Indians at Agua Caliente were of the Coahuilla nationality.

We might add that the reasons why no especial notice was given to San Luis Rey mission in the investigation before the prefect were two.—

First, the San Luis Rey mission and all these ranches were included in the San Diego district, which extended to and included San Juan Capistrano, and the certificate of Father Olivas was sufficient.

Secondly, the only priest in 1844 and 1845 at the San Luis Rey mission was Padre Jose M. Zalvidea, who was in a state of dotage, (Bancroft, Vol. 21, Page 422) and it would have been useless to have applied to San Luis Rey.

IV.

We think we have disposed of the argument based on the reservation of *servidumbres* in the grant. We concur with plaintiffs in error that the definition contained in the Nuavo Dictionario de la Lengua Castellanna is the ordinary meaning of the word, and an examination of Escriche's dictionary will show not only the definition cited but the other meanings of the word which we have cited in the appendix to our brief. Instead of citing the law dictionary we have preferred in our brief to go back to the Partidas, which is the basis of the law and from which the definitions in all the dictionaries are drawn. We

think there can be no question that whether one applies the rule of *noscitur a sociis,* a rule founded on the habits of human thought and as applicable to a Spanish or Mexican instrument as to one in the English language, or whether we interpret the word in the light of all the surrounding circumstances in its ordinary use, that cannot include rights of the character claimed by the plaintiffs in error.

V.

We ask the Court to dismiss this writ of certiorari and also that in the case No. 210, Quevas vs. Barker. Plaintiffs in error rely upon the decision of this Court in the Christy vs. Pridgeon, 4 Wall. 196, in which Mr. Justice Field held that the Mexican Colonization Law of August 18, 1824 "though general to the republic of Mexico was, so far as it affected lands within the limits of Texas, a local law of the new State as much so as if it had originated in her legislation." And added, "The interpretation, therefore, placed upon it by the highest court of that State must, according to the established principles of this Court, be accepted as the true interpretation, so far as it applies to land in that State whatever may be our opinion of its original soundness."— In the case of a different ruling of the Supreme Court of another State organized out of Mexican

territory such decision was declared by the lower Judge to be a rule of property.—And adds, "The courts of the United States in comformity with the same principles follow a different ruling so far as it applies to titles in those States."

We respectfully suggest to this Court that if, as urged by plaintiffs in error, the decision in Byrne vs. Alas holding that Indians have rights which are preserved under the Mexican Colonization Law of August 18, 1824, is a rule of property binding on this Court, then it follows as a matter of course that the decision of the Supreme Court of California in Barker vs. Harvey in holding in the case at bar that the "grant under consideration did not interfere with any such alleged rights, therefore if it were permitted to go behind the patent and the grant itself, there was no defense on the part of the appellants to the plaintiffs' action" is also a rule of property and is binding upon this Court. Moreover, the judgment should not only be affirmed but this Court should dismiss the action on the ground that it has no jurisdiction, for although the question whether such rights were preserved by the treaty of Guadalupe Hidalgo and whether the patent is conclusive are Federal questions reviewable by this Court, the question of local law is not so reviewable, and even if the issue as to the conclusiveness of the patent was decided erroneously,

the decision holding that the finding of the prefect was conclusive against the plaintiffs in error is sufficient to support the judgment, and this Court has no jurisdiction.

City and County of San Francisco vs. Scott, 111 U. S. 768.

Phillips v. Mound City Land & Water Ass'n, 124 U. S. 605

Crystal Springs Land & Water Co., v. City of Los Angeles, 177 U. S. 169.

Since that point was sufficient to support the judgement the appeal must be dismissed.

Pierce v. Somerset Railway, 171 U. S. 640.

Harrison v. Morton, 171 U. S. 38.

Seneca Nation v. Christie, 162 U. S. 33.

Eustice v. Bowles, 150 U. S. 61.

Respectfully submitted,

CHARLES MONROE,
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Attorneys for Defendant in Error.

Office Supreme Court U.S.
FILED
MAR 16 1901
JAMES H. McKENNEY,
Clerk.

No. 210.

Brief for Defendants in Error

By. of White, Monroe & Withington for D. E.

SUPREME COURT OF THE UNITED STATES

October Term, 1900

NO. 210

Filed Mar. 16, 1901.

JESUS QUEVAS, SOMETIMES CALLED JESUS CUEVO, ET ALI., PLAINTIFFS IN ERROR.

vs.

J. DOWNEY HARVEY, ADMINISTRATOR OF THE ESTATE OF JOHN G. DOWNEY, DECEASED, DEFENDANT IN ERROR.

STEPHEN M. WHITE,
CHARLES MONROE,
DAVID L. WITHINGTON,
CASSIUS CARTER,

Attorneys for Defendant in Error.

FILED, MARCH,..... 1901

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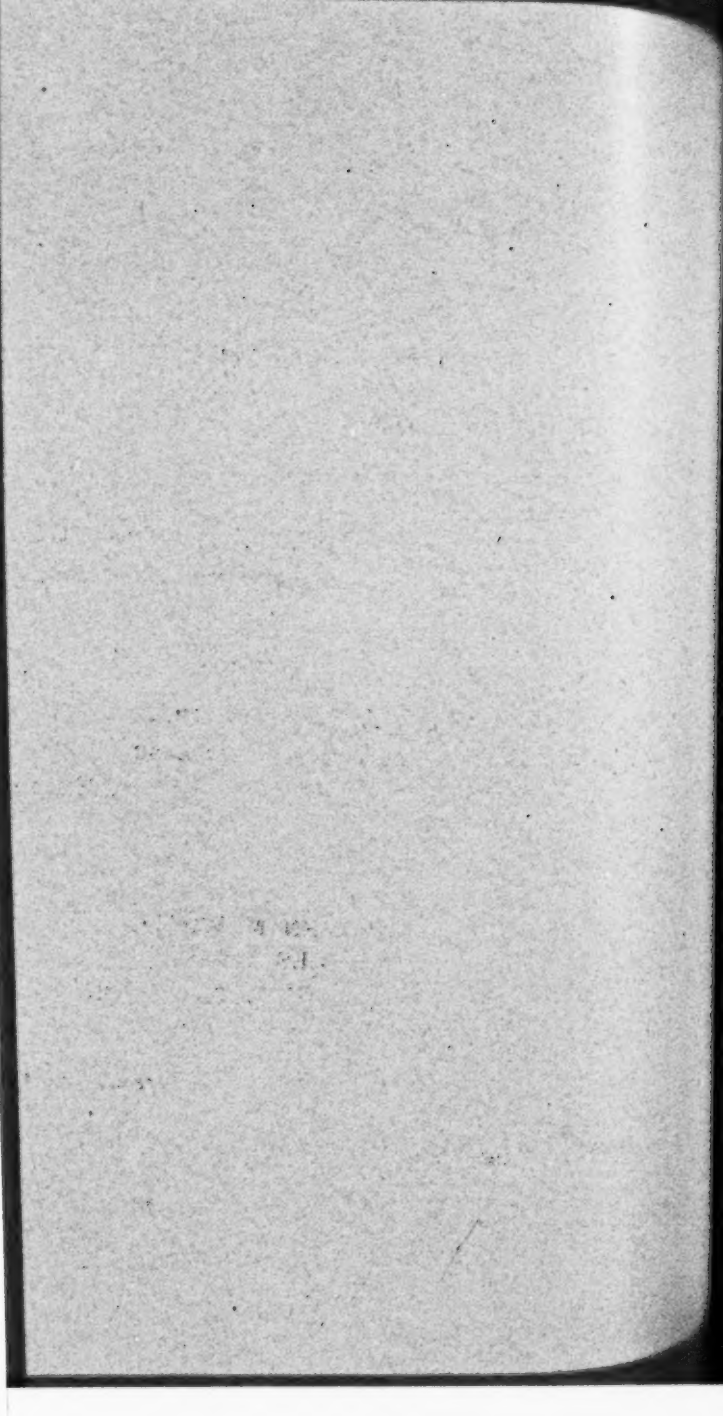

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1900.

No. 210.

JESUS QUEVAS, et ali.,
Plaintiffs in Error,
vs.
J. DOWNEY HARVEY, Adm.,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The defendant in error joins with the plaintiffs in error in submitting this case on the briefs and argument in case of Barker vs. Henry, No. 209. In this brief, we will, for the convenience of the court, as we suggested in that brief, point out the

distinctions which exist between that case and the case at bar.

The two grants comprise the entire San Jose valley and together form what is known as Warner's Ranch, the northern portion being involved in the Barker case, and the southern, or Portilla grant, being involved in the case at bar. The Portilla grant was made earlier than the grant to Warner, namely, in 1836. The grant is indefinite in its description and is located in the petition of Portilla shown in the expediente as "situated at the entrance to the east road to the Colorado River," and in the grant as "cuatro sitios de genado mayor in the valle de San Jose." It was thus a floating grant for a definite amount within the general confines of the Valley de San Jose.

The Indians in this case are not of the Coahuilla tribe, they are probably Shoshone, and are what are locally known as Dieguenos.

There was no finding of the perfect in the expediente nor is there any report from either of the missions, but the petition was referred to Arguello, military commander of San Diego, who reported that it is on the highway on which travel the people from Senora, and that although the Mission San Diego formerly had stock thereon, on account of the distance "and from the danger on the part of the wild Indians who

are very numerous there they had to take them away." The grant was thereupon made with the usual clause that the grantee may enjoy it freely and exclusively. There is no pretence in the evidence that the mission of San Luis Rey had any claim to the portion of the valley included within the patent.

We submit that the judgment of the Supreme Court of California should be affirmed on the grounds set forth in the brief in the Barker case and that this court has no jurisdiction of the cause and that the case should be dismissed on that ground.

It is true that there is no report from the Mission in this case and no finding by the perfect that the premises were vacant and unoccupied at the time of making the grant, but the military commander of San Diego, Arguello's finding and report in effect shows that the land was vacant and that if any Indians were there they were wild Indians and not Mission Indians, and as the decision in the Supreme Court of California simply shows that the judgment was affirmed on the grounds set forth in Harvey vs. Barker, which case was decided amongst other grounds, upon this, that whatever rights the Indians may have had, if any, the finding of the perfect was conclusive against them, and this ground being sufficient to sustain the decision

and not subject to review by this court, the writ should be dismissed.

Respectfully submitted,

CHARLES MONROE,
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CASSIUS CARTER,

Attorneys for Defendant in Error.

Supreme Court of the United States.

Nos. 209 and 210.—October Term, 1900.

Allejandro Barker, Baleriana Barker, Angela Barker, et al., Plaintiffs in Error, 209 vs. J. Downey Harvey, Administrator of the estate of John G. Downey, deceased, and the Merchants' Exchange Bank of San Francisco.	In error to the Supreme Court of the State of California.
Jesus Quevas, sometimes called Jesus Cuevo, et al., Plaintiffs in Error, 210 vs. J. Downey Harvey, Administrator of the estate of John G. Downey, deceased.	

[May 13, 1901.]

These cases were brought by defendants in error in the superior court of the county of San Diego, California, to quiet their title to certain premises in that county. Decrees rendered in their favor were carried to the Supreme Court of the State, and by that court affirmed. (126 Cal. 262.) To such affirmance these writs of error have been sued out.

The facts in the cases are so nearly alike that it is sufficient to consider only the first. The land in question is within the limits of the territory ceded to the United States by the treaty of Guadalupe Hidalgo, February 2, 1848. (9 Stat. 922.) Generally speaking, the plaintiffs claim title by virtue of a patent issued to John J. Warner on January 16, 1880, in confirmation of two grants made by the Mexican government. On the other hand, the defendants do not claim a fee in the premises but only a right of permanent occupancy by virtue of the alleged fact that they are Mission Indians, so called, and had been in occupation of the premises long before the Mexican grants, and, of course, before any dominion acquired by this government over the territory; insisting, further, that the government of Mexico had always recognized the lawfulness and permanence of their occupancy, and that such right of occupancy was protected by the terms of the treaty and the rules of international law.

The treaty of Gaudalupe Hidalgo provided in article 8 as follows:

"Article VIII.

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the

property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever.

"Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

"In the said territories, the property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

Article 10, as originally prepared, was stricken out by the Senate, but in the protocol signed by the representatives of the two nations, at the time of the ratification, on May 26, 1848, it was stated:

"2d. The American government by suppressing the tenth article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

"Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territory, are those which were legitimate titles under the Mexican law in California and New Mexico, up to the 13th of May, 1846, and in Texas up to the 2d March, 1836." (Ex. Doc. No. 50 H. R. 30th Cong. 2d Sess. p. 77.)

After the acquisition of this territory Congress, on March 3, 1851, (9 Stat. 631,) passed an act entitled "An act to ascertain and settle the private land claims in the State of California," which created a commission to receive and act upon all petitions for confirmation of such claims. Its decision was subject to appeal to the District Court of the United States, and thence to this court. As originally organized the commission was to continue for three years, but that time was extended by subsequent legislation. Sections 8, 13, 15 and 16 are as follows:

"SEC. 8. That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is

founded, to the district attorney of the United States in and for the district in which such decision shall be rendered."

"SEC. 13. That all lands, the claims to which have been finally rejected by the commissioners in the manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims the said surveyor general shall have the same power and authority as are conferred on the registrar of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act 'to create the office of surveyor of the public lands for the State of Louisiana,' approved third March, one thousand eight hundred and thirty-one: Provided, always, That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same: And provided, further, That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the Commissioner of the General Land Office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved."

"SEC. 15. That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

"SEC. 16. That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians."

On the trial before the court, without a jury, the findings of fact were in substance that the plaintiffs had the ownership in fee simple of the premises described; that the defendants had no rights or interest therein, and the decree was in accordance therewith. The statement on appeal

prepared by the trial court disclosed that the plaintiffs introduced in evidence the patent to John J. Warner, which patent recited the filing of a petition by Warner with the land commission praying for confirmation of his title, a title based on two Mexican grants—one June 8, 1840, to José Antonio Pico by Juan B. Alvarado, then constitutional governor of the Californias, and the second, November 28, 1844, to petitioner by Manual Micheltorena, governor general commandant and inspector general of the Californias; recited also a decree of confirmation of such title, an appeal to the District Court of the United States and an affirmance of the decision of the commission, the return of the surveyor general of the State showing a survey; and conveyed the premises to Warner, "but with the stipulation that in virtue of the fifteenth section of the said act neither the confirmation of this claim nor this patent shall affect the interests of third persons." It was admitted that Warner's title had passed to plaintiffs, and that the taxes had all been paid by them. On the other hand, the appeal statement showed that the defendants offered copies of the expedientes of both of the grants referred to in the patent, and also oral testimony of occupation by the defendants and their ancestors. Some witnesses were introduced by the plaintiffs to contradict this matter of occupancy, but on final consideration the court struck out all the testimony in reference to occupancy and of the Mexican grants upon which the patent was issued. Upon the evidence, therefore, that was received by the trial court there could be no doubt of the rightfulness of the decree, and the question presented by the record to the Supreme Court of the State was whether there was error in striking out the testimony offered on behalf of the defense.

Mr. Justice BREWER delivered the opinion of the Court.

Undoubtedly by the rules of international law, and in accordance with the provisions of the treaty between the Mexican government and this country, the United States were bound to respect the rights of private property in the ceded territory. But such obligation is entirely consistent with the right of this government to provide reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to lands to present them for recognition, and to decree that all claims which are not thus presented shall be considered abandoned. "Undoubtedly private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. But the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged

to the political department of the government; and Congress might either itself discharge that duty or delegate it to the judicial department. (*De la Croix* v. *Chamberlain*, 12 Wheat. 599, 601, 602; *Chouteau* v. *Eckhart*, 2 How. 344, 374; *Tameling* v. *United States Freehold Co.*, 93 U. S. 644, 661; *Botiller* v. *Dominguez*, 130 U. S. 238.)" *Astiazaran* v. *Santa Rita Land & Mining Co.*, 148 U. S. 80, 81.

Botiller v. *Dominguez*, (130 U. S. 238,) the last case cited in the foregoing quotation, deserves special notice. The Supreme Court of California had held in several cases that a perfect title need not be presented to the land commission; that it was recognized by the treaty of cession, and required no further confirmation; that the act to ascertain and settle private land claims applied only to those titles which were imperfect and needed the action of some tribunal to ascertain and establish their validity. But in this case, which came from the Supreme Court of California, we held the contrary. We quote at some length from the opinion. Thus, on page 246, it was said:

"Two propositions under this statute are presented by counsel in support of the decision of the Supreme Court of California. The first of these is, that the statute itself is invalid, as being in conflict with the provisions of the treaty with Mexico, and violating the protection which was guaranteed by it to the property of Mexican citizens, owned by them at the date of the treaty; and also in conflict with the rights of property under the Constitution and laws of the United States, so far as it may affect titles perfected under Mexico. The second proposition is, that the statute was not intended to apply to claims which were supported by a complete and perfect title from the Mexican government, but, on the contrary, only to such as were imperfect, inchoate and equitable in their character, without being a strict legal title.

"With regard to the first of these propositions it may be said, that so far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two States must determine by treaty, or by such other means as enables one State to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. (*The Cherokee Tobacco*, 11 Wall. 616; *Taylor* v. *Morton*, 2 Curtis, 454; *Head Money Cases*, 112 U. S. 580, 598; *Whitney* v. *Robertson*, 124 U. S. 190, 195.)"

In reference to the second proposition, after noticing several provisions of the statute, it was declared (p. 248):

"It is not possible, therefore, from the language of this statute, to infer that there was in the minds of its framers any distinction as to the jurisdiction they were conferring upon this board, between claims derived from

the Spanish or Mexican government, which were perfect under the laws of those governments, and those which were incipient, imperfect or inchoate. . . . It was equally important to the object which the United States had in the passage of it, that claims under perfect grants from the Mexican government should be established as that imperfect claims should be established or rejected.

"The superior force which is attached, in the argument of counsel, to a perfect grant from the Mexican government had its just influence in the board of commissioners or in the courts to which their decisions could be carried by appeal. If the title was perfect, it would there be decided by a court of competent jurisdiction, holding that the claim thus presented was valid; if it was not, then it was the right and the duty of that court to determine whether it was such a claim as the United States was bound to respect, even though it was not perfect as to all the forms and proceedings under which it was derived. So that the superior value of a perfected Mexican claim had the same influence in a court of justice which is now set up for it in an action where the title is contested.

"Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of lands unclaimed, and unjustly claimed, to present his demands to a tribunal possessing all the elements of judicial functions, with a guarantee of judicial proceedings, so that his title could be established if it was found to be valid, or rejected if it was invalid.

"We are unable to see any injustice, any want of constitutional power, or any violation of the treaty, in the means by which the United States undertook to separate the lands in which it held the proprietary interest from those which belonged, either equitably or by a strict legal title, to private persons. Every person owning land or other property is at all times liable to be called into a court of justice to contest his title to it. This may be done by another individual, or by the government under which he lives. It is a necessary part of a free government, in which all all are equally subject to the laws, that whoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them."

The views thus expressed have been several times reaffirmed by this court, the latest case being *Florida* v. *Furman*, (180 U. S. 402,) in which, after quoting the passage last above quoted, we said, in reference to statutes of the United States respecting claims in Florida (p. 438):

"We are of opinion that these acts applied and were intended to apply to all claims, whether perfect or imperfect, in that particular resembling the California act; that the courts were bound to accept their provisions; and that there was no want of constitutional power in prescribing reasonable limitations operating to bar claims if the course pointed out were not pursued."

See also *Thompson* v. *Los Angeles Farming &c. Co.*, (180 U. S. 72, 77,) in which it was said in reference to the statute before us:

"Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to

give repose to titles. It was enacted not only to fulfil our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted but required all claims to be presented to the board, and barred all from future assertion which were not presented within two years after the date of the act. (Sec. 13.) The jurisdiction of the board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction to decide rightly or wrongly. If wrongly a corrective was afforded, as we have said, by an appeal by the claimant or by the United States to the District Court."

These rulings go far toward sustaining the decision of the Supreme Court of California in the present cases. As between the United States and Warner, the patent is as conclusive of the title of the latter as any other patent from the United States is of the title of the grantee named therein. As between the United States and the Indians, their failure to present their claims to the land commission within the time named made the land within the language of the statute "part of the public domain of the United States." "Public domain" is equivalent to "public lands," and these words have acquired a settled meaning in the legislation of this country. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." (*Newhall* v. *Sanger*, 92 U. S. 761, 763.) "The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws." (*Bardon* v. *Northern Pacific Railroad Co.*, 145 U. S. 535, 538.) See also *Mann* v. *Tacoma Land Co.*, (153 U. S. 273, 284.) So far, therefore, as these Indians are concerned the land is rightfully to be regarded as part of the public domain and subject to sale and disposal by the government, and the government has conveyed to Warner. It is true that the patent, following the fifteenth section of the act, in terms provides that the patent shall not "affect the interests of third persons," but who may take advantage of this stipulation? This question was presented and determined in *Beard* v. *Federy*, (3 Wall. 478,) and the court, referring to the effect of a patent, said (pp. 492, 493):

"When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. . . . The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration, and they could not, therefore, in the language just quoted, "resist successfully any action of the government in disposing of the property." If it be said that the Indians do not claim the fee, but only the right of occupation, and, therefore, they do not come within the provision of section 8 as persons "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government," it may be replied that a claim of a right to permanent occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal. Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy.

Again, it is said that the Indians were, prior to the cession, the wards of the Mexican government, and by the cession became the wards of this government; that, therefore, the United States are bound to protect their interests, and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians. By the act creating the land commission the commissioners were required (sec. 16) "to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians." It is to be assumed that the

commissioners performed that duty, and that Congress, in the discharge of its obligation to the Indians, did all that it deemed necessary, and as no action has been shown in reference to these particular Indians, or their claims to these lands, it is fairly to be deduced that Congress considered that they had no claims which called for special action.

But we are not compelled to rest upon any presumptions from the inaction of Congress. Turning to the testimony offered in respect to the matter of occupation, it may be stated that there was sufficient to call for a finding thereon if the fact of occupation was controlling. But in the Mexican grants upon which Warner based his application to the commission for a confirmation of his title we notice these things: The first grant was in 1840, to José Antonio Pico. The application was for "the place 'Agua Caliente,' belonging to the mission of San Luis Rey, since it is not needed by the said mission, having a house on it, and an orchard of little utility." The report of the justice of the peace was "that the land 'Agua Caliente' is the property of the San Luis Rey Mission, which has improvements, buildings and an orchard, from which derive their subsistence the Indians who live thereon, which is bounded by the property of Joaquin Ortega, and I believe it can be awarded to the interested party for being worthy, but without prejudice to the Indians, who from it derive their support."

The last paper in the expediente was the following:

"*Juan B. Alvarado, Constitutional Governor of the Department of both Californias:*

"Whereas José Antonio Pico has petitioned for his own personal benefit and that of his family the land known by the name of 'Agua Caliente,' bounded by the ranch of 'San José Valley,' with the boundary of the canyon of 'Buena Vista,' and by the mountains of 'Palomar,' having previously complied with the writs and investigations corresponding, as required by the laws and regulations, exercising the powers which are conferred on me in the name of the Mexican nation, I have resolved to grant to him the said place, subjecting himself to pay for the place of worship and other improvements that be there, belonging to the San Luis Rey Mission, and not molest (prejudicar) the Indians that thereon may be established, and to the approbation of the most excellent assembly of the department, and to the conditions following, to wit:

"First. He is allowed to fence it in, without interfering with the roads, cross roads and other usages (servidumbres); he will possess it fully and exclusively, turning it to agricultural or any other use he may see fit, but within a year he shall construct a house thereon and live in it.

"Second. When the property shall have been confirmed to him, he shall petition the respective judge to give him possession thereof, by virtue of this order, and shall mark out the boundaries on whose limits he shall fix the landmarks, some fruit and wild trees that may be of some utility.

"Third. The land of which donation is hereby made is of the extent mentioned in the plan, which goes with the 'expediente.' The judge who

should give possession thereof shall have it surveyed according to law, leaving the residue that may result to the nation for other purposes.

"Fourth. If he should fail to comply with these conditions, he shall forfeit his title to the land, and it will be denounceable by another.

"Therefore, I command that this present order be to him the title, and holding it for good and valid, a copy thereof be entered into the proper book, and given to the party interested for his protection and other purposes."

No approval of this grant by the departmental assembly appears of record, but the finding of the commission was that whatever of right passed to Pico was transferred by conveyances to Warner. The second grant, that in 1845, was made directly to Warner, upon his personal application, which application was thus endorsed:

"OFFICE OF THE FIRST JUSTICE OF THE PEACE,
San Diego.

"In view of the petition which the party interested remits to this office, I beg to state that the said 'Valle San José' is, and has for the past two years been vacant and abandoned, without any goods nor cultivation on the part of San Diego; but said place belongs at the present time to the said mission, and at petitioner's request I sign this in San Diego.

"August 6, 1844. JUAN MA MARRON.

"*To the Most R. P. Vincent Olivas:*

"With the object of soliciting in property the place known by the name 'Valle de San José,' formerly occupied by the mission under your charge, I beg of you to be so kind as to inform me if, at the present day, the Mission of San Diego does occupy the said land, and if not, how long since it has been abandoned.

"San Diego, August 5, 1844. JUAN J. WARNER.

"The 'Valley of San José' can be granted to the party who petitions for it, inasmuch as the Mission of San Diego, to whom it belonged, has no means sufficient to cultivate and occupy it, and it is not so necessary for the mission. FR. VINCENT P. OLIVAS.

"Mission of San Diego, August 5, 1844."

The grant was in these words:

"The citizen, Manuel Micheltorena, general of brigade of the Mexican army, adjutant general of the same, governor general, commander and inspector of both Californias:

"Whereas Juan José Warner, Mexican by naturalization, has petitioned for his own personal benefit, and that of his family, the land known by the name 'Valle de San José,' bounded on the east by the entrance into San Felipe and the mountain, on the west by the mountain and canyon of Aguanga; and on the north bounded by the mountain, and the boundaries on the south being the 'Carrizo' and the mountain; having previously complied with the notices and investigations on such matters as prescribed by the laws and regulations, exercising the powers conferred on me in the name of the Mexican nation, I have resolved to grant him the said land, declaring it by these presents his property, subject to the approbation

of the most excellent assembly of the department, and to the conditions following, to wit:

"First. He will not be allowed to sell it, to alienate it, nor to mortgage it, to place it under bond, or to place it under any obligation, nor give it away.

"Second. He will be allowed to fence it in, without interference with the roads, and other usages, (servidumbres). He will hold it freely and exclusively, turning it to agriculture, or any other use he may please, and he shall build a house on it within one year, and live in it.

"Third. He shall apply to the respective judge to give him judicial possession thereof, by virtue of this order, by which he shall mark out the boundaries whereon he shall place the stakes, some fruit and wild trees of some use or other.

"Fourth. The land which is being granted consists of six leagues, more or less (seis sitios de ganado mayor) according to the respective map or plan. The judge who may give possession thereof shall have it surveyed according to law, leaving the residue (sobrante) to the nation for its use.

"Fifth. Should he fail to comply with these conditions, he shall forfeit his right to the land, and it will be denounceable by another. Therefore I order that this present decree be to him his title, and holding it for good and valid notice thereof be entered into the respective books and be given to the interested party for his protection and otner purposes."

The grant was subsequently approved by the departmental assembly on May 21, 1845. On the application to the Private Land Commission the matter was investigated, and a report made by Commissioner Felch, in these words:

"*J. J. Warner* v. *The United States*, for the place called Agua Caliente y Valle de San José, in San Diego County, containing six square leagues of land.

"Two grants are presented and proved in this case: The first made by Governor Juan B. Alvarado to José Antonio Pico, on the 8th day of June, 1840; the other by Governor Manuel Micheltorena, on the 28th day of November, 1844, to the present claimant. The land embraced in the grant to Pico is designated by the name Agua Caliente, and that described in the grant to Warner is called the Valle de San José. On comparing the descriptions of the two parcels of lands and maps which constitute portions of the two expedientes, it is manifest that the grant to Warner embraces the premises described in the previous grant to Pico. The place known by the name of Agua Caliente constitutes the northern portion of the valley known by the name of San José, while the grant to Warner describes the entire valley, and the witnesses testify that the rancho claimed by Warner is known by these names, but more frequently it has recently been called Warner's rancho. The testimony shows that Pico had set out some vines on the place before the grant was made to him, and that he built a house on the place after the grant, but in 1842 he left the place, probably on account of the danger from the Indians, and does not appear to have done anything more in connection with it.

"The proof is scarcely sufficient to establish the performance of the conditions of the grant by him, while his absence from the place, and the want of any evidence of an attempt to return to it after 1842, indicates an

abandonment of it. It was so treated by Warner in petitioning for a grant of the same in 1844, and by the governor in making the concession to him. If, however, there was any remaining interest in said Pico by virtue of the grant to him, the present claimant has succeeded to that interest by virtue of a conveyance made to him by said Pico on the thirteenth day of January, 1852. This conveyance is given in evidence.

"I think, however, that the right of the present claimant must be determined entirely by the merits of the case based on Micheltorena's grant to him.

"This grant was approved by the departmental assembly May 21, 1845.

"The testimony of Andres Pico shows that Warner was living with his family on the place in the fall of 1844 and cultivating portions of the land.

"His residence on the place appears to have been continued until 1851, when the Indians burnt his buildings and destroyed his stock. Since that time his occupation has been continued by his servants.

"In the grant, the description of the land petitioned for is such as to embrace the entire valley called San José, as laid down on the map constituting a part of the expediente, giving well-defined landmarks and boundaries, which the witnesses testify are well-known objects.

"The valley is very irregular in shape and is surrounded by high hills.

"Juridical measurement was required and the quantity of six square leagues was granted, but as the measurement was never obtained, it is important to determine whether the grantee is entitled to hold the entire premises described in the grant; using the scale given on the desino referred to in the grant, the quantity included in the premises cannot exceed six square leagues of land.

"The testimony of the witnesses who were interrogated on the subject estimate it variously; some more and some less than the quantity conceded. On an examination of the whole case, however, we are inclined to the opinion that the petitioner should have a confirmation of the premises according to the description contained in the grant to him, and a decree will be entered accordingly."

Upon that report the title was confirmed, which, as heretofore stated, was approved by the District Court, and thereupon a patent was issued.

From these papers the following appears: The grant to Pico was made subject to the condition that he should "not molest the Indians that thereon may be established." No such condition was attached to the subsequent grant to Warner. On the contrary, the report of the justice of the peace was that the land had been for two years vacant and abandoned; that there was some property rights vested, not in the Indians, but in the Mission of San Diego, and the official of that mission consented to the grant, inasmuch as the mission had no means to cultivate and occupy the land, and it was no longer necessary for its purposes.

Some discussion appears in the briefs as to the meaning of the word translated "usages" (servidumbres) which appears in both grants, and it is contended by the plaintiffs in error that it is equivalent to the English word "servitudes," and is broad enough to include every right which any one may have in respect to the premises, subordinate to the fee. We shall

not attempt to define the meaning of the word standing by itself. It may be conceded that it was sometimes used to express all kinds of servitudes, including therein a paramount right of occupation, but the context seems to place a narrower meaning upon its use here. Thus, in the first grant not only is there the distinct provision that the Indians established on the land shall not be molested, but the grantee "is allowed to fence it in without interfering with the roads, cross roads, and other usages" (servidumbres). In the second the grantee is "allowed to fence it in without interference with the roads and other usages" (servidumbres). Obviously, it is in these two clauses contemplated that the fencing is to be without interference with roads and other usages or burdens. It does not mean that the general occupation and control of the property is limited by any so-called servidumbres, but only that such full control shall not be taken as allowing any interference with established roads or cross roads, or other things of like nature.

It thus appears that prior to the cession the Mexican authorities, upon examination, found that the Indians had abandoned the land; that the only adverse claim was vested in the Mission of San Diego, and made an absolute grant, subject only to the condition of satisfying whatever claims the mission might have. How can it be said therefore that when the cession was made by Mexico to the United States there was a present recognition by the Mexican government of the occupancy of these Indians? On the contrary, so far as any official action is disclosed, it was distinctly to the contrary, and carried with it an affirmation that they had abandoned their occupancy, and that whatever of title there was outside of the Mexican nation was in the mission, and an absolute grant was made subject only to the rights of such mission.

For these reasons we are of opinion that there was no error in the rulings of the Supreme Court of California, and its judgments in the two cases are

Affirmed.

Mr. Justice WHITE did not hear the argument of these cases or take part in their decision.

True copy.

Test:

Clerk Supreme Court, U. S.